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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 391.

THADDEUS G. BENTON,
Petitioner,

vs.

VINSON, ELKINS, WEEMS AND SEARLS, A PARTNERSHIP OF LAWYERS COMPOSED OF JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS ET AL., AND EACH OF THE MEMBERS OF SAID PARTNERSHIP, INDIVIDUALLY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

McNally and Krieger,
230 Park Avenue,
New York, N. Y.,
Thaddeus G. Benton,
77 Park Avenue,
New York, N. Y.,
Pro Se,
Attorneys for Petitioner.

Neilson Olcott,
1 East 42nd Street,
New York, N. Y.,
Of Counsel.

E. L. Mendenhall, Inc., 1108 Oak Street, Kansas City 6, Mo., HArris 1-3030

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THADDEUS G. BENTON,
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VINSON, ELKINS, WEEMS AND SEARLS, A PARTNERSHIP OF LAWYERS COMPOSED OF JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS ET AL., AND EACH OF THE MEMBERS OF SAID PARTNERSHIP, INDIVIDUALLY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above action May 28, 1958 (App. 1A) affirming the judgment of the United States District Court for the Southern District of New York

denying petitioner's motion under Federal Rule of Civil Procedure 60 (b) for relief, due to mistake and inadvertence—seeking the withdrawal of his voluntary notice of dismissal of the action, an order vacating an order transferring the action to Texas, and leave to file an amended complaint (Ptr's separate append., pp. 8-13).

A petition for rehearing was duly filed, and denied by *per curiam* opinion on June 23, 1958 (App. 3A).

The decisions below are contradictory of fundamental law as repeatedly affirmed by this court, dealing with the transfer of actions to other states under section 1404 (a), Title 28, U. S. C., and with relief from mistakes and inadvertence under Federal Rule of Civil Procedure 60 (b); and, unless reversed, will operate to complicate and confuse the administration of justice in the federal courts, and to destroy private rights of substantial value.

OPINIONS BELOW.

The opinion of the District Court is not reported in Federal Supplement. The District Court's order appears at page 7 of petitioner's separate appendix, and its long form order appears at page 68 of Appendix to brief of appellee in the court below.

The opinion of the United States Court of Appeals appears at 225 F. 2d 299 (See App. p. 1A).

JURISDICTION.

The judgment of the United States Court of Appeals was entered May 28, 1958. Petition for rehearing was denied June 23, 1958, reading: "*Per Curiam*: Petition for rehearing denied."

Sections 2101 (c) and 1254 of Title 28 U. S. C. are believed to confer jurisdiction on this court to review the judgment by writ of certiorari.

QUESTIONS PRESENTED.

The basic, and substantial question presented is whether a litigant's right to the trial of his action in the state of his residence should be destroyed by the mistake of the trial court and the litigant and his attorneys. Such substantial question is determinable by the answers to four subdivisions:

1. Whether an order of the United States District Court for the Southern District of New York transferring the action to the United States District Court for the Southern District of Texas, pursuant to section 1404 (a), Title 28 U. S. C., was void because the action "might" not "have been brought" in Texas because of its two-year statute of limitations which barred the action, which is the essential condition of the statute permitting the transfer, *i. e.*, only if the action "might have been brought" in such transferee jurisdiction.

2. Whether the United States District Court abused any discretion it had under Federal Rule of Civil Procedure 60 (b) (1) in not reinstating the discontinued action, following petitioner's voluntary discontinuance of the action because of its transfer to Texas which transfer was made by the mistake and inadvertence of the court and petitioner in not having recognized that the action "might" not "have been brought" in Texas because of its two-year statute of limitations.

3. Whether the United States Court of Appeals ignored and nullified the intent of Federal Rule of Civil Procedure

60 (b) that "any mistake, inadvertence, surprise or excusable neglect", including mistakes of *law* and fact, are grounds for relief under that rule.

4. Whether the United States Court of Appeals abdicated its judicial function in not adjudicating whether the Texas or the New York statute of limitations would apply to the action if transferred to Texas—an essential condition to any decision.

Petitioner most sincerely urges that each question can be properly answered only in the affirmative.

STATEMENT OF THE CASE.

Petitioner, a resident of New York, commenced this action in the Supreme Court of New York by personal service of process upon respondent Searls, a member of defendant partnership. Respondents removed the action to the United States District Court for the Southern District of New York.

The complaint alleged three causes of action:

1. That defendants as attorneys for one Blair in an action in the United States District Court for the Southern District of Texas, seeking recovery of petitioner's share of partnership assets worth $1,000,000, knowingly misrepresented to the trial court material facts and the contents of documentary evidence in violation of the federal penal statute, and caused the trial judge to believe such facts and to enter a clearly erroneous judgment against petitioner as held by the United States Court of Appeals for the Fifth Circuit, to the damage of plaintiff of $25,000.

2. That respondents in procuring such erroneous judgment tortiously and wrongfully caused the defendant

Blair to breach his agreement with petitioner not to dispose of the partnership assets pending final disposition of such action, and permitted Blair to dispose of such assets, including an assignment to respondent Searls, to the damage of petitioner of $1,000,000.

3. That respondents caused the trial judge in *Benton v. Blair* to have a bent and prejudiced mind against plaintiff, and to have an arbitrary and mistaken belief that the said action should be decided in favor of Blair irrespective of the evidence compelling a judgment for petitioner, which the trial judge did; that thereafter the trial judge wrongfully permitted plaintiff's counsel to withdraw without proper notice to plaintiff (for illness) and when it was impossible for plaintiff to obtain substitute trial counsel; that thereafter on appeal to the United States Court of Appeals for the Fifth Circuit that court held that the judgment of the trial judge was clearly erroneous and remanded the case "for a further trial of the issues" which meant of course that unless Blair could overcome the evidence for the plaintiff judgment should be entered for the plaintiff; that thereafter the said trial judge's mind was irrevocably fixed as against plaintiff, that he refused to recuse himself upon the filing of plaintiff's affidavit of prejudice, and insisted upon the granting of a whole new trial in violation of the mandate of the United States Court of Appeals, he denied plaintiff the right personally to try the action in violation of the Federal statute made and provided, he insisted that plaintiff obtain a Texas lawyer to represent him which plaintiff could not do because of defendant's and the trial judge's influence; and he evinced his purpose not to conduct the further trial fairly and dispassionately but to decide the facts against the plaintiff; that defendants, under the comfort of the acts of the trial judge, refused to recognize the just rights of plaintiff be-

cause they were assured that the trial judge would again make a conclusive fact finding against the plaintiff which would defeat his cause of action, knowing that they had succeeded in having the trial judge conclusively prejudge the case; that except for the facts aforesaid plaintiff would have recovered judgment against Blair for approximately $1,000,000; and that plaintiff was thereby coerced under duress to compromise his action against Blair for $21,137.50 compared with its true value of approximately $1,000,000.

January 10, 1957, respondent Searls moved the District Court to transfer the action to Texas under Section 1404, Title 28, U. S. C., in the interest of justice and for convenience of respondents. Petitioner's affidavits of January 27 and 28, 1957, opposed the motion (R. 186-191, 211-214). Upon argument of the motion on January 18, 1957, plaintiff filed his cross motion for summary judgment on the issue of liability, based upon his affidavit and the record of proceedings in *Benton* v. *Blair*.

February 28, 1957, the trial judge (Hon. Sylvester J. Ryan) granted respondent's motion to transfer the action to Texas, and denied petitioner's motion for summary judgment on the ground that "Without answers made and issue joined we are not in a position to say that factual issues are not present on the question of liability; nor do we now hold that plaintiff's complaint states a claim entitling him to relief." (Appendix to respondent's brief, p. 55). Without hearing upon petitioner's motion for rehearing of the motion to transfer the action to Texas, the trial judge on March 11, 1957, entered formal orders.

The trial judge had accepted the first and second causes of action as stating proper claims for relief, but held that the third cause of action was contumacious of the United States District Court in Texas (Appendix to respondent's

brief, pp. 60-63). It is clear from the trial judge's opinion that it was the third cause of action which was the principal reason for ordering the action transferred to Texas. Such third cause of action has been eliminated from the tendered amended complaint with the petitioner's motion seeking to vacate the order of transfer. There is thus presented in the tendered amended complaint two simple causes of action based on tortious conduct of the respondent Searls alone, as evidenced conclusively by the certified record in the action of *Benton* v. *Blair* and, by clear deduction, by the decision of the United States Court of Appeals for the Fifth Circuit. Petitioner has thus eliminated from the tendered amended complaint any valid ground for transferring the action to Texas, even if the action "might" have been "brought" there in the first instance which could not have been because of the two-year Texas statute of limitations.

The United States Court of Appeals for the Second Circuit on April 16, 1957, by *per curiam* decision, without opinion, denied petitioner's application for a writ prohibiting the transfer of the action to Texas.

Before the mandate of the Court of Appeals was received in the District Court, and before the record was transferred to Texas, petitioner filed his voluntary dismissal of the action pursuant to Federal Rule 41 (a) (1).

Respondent's motion to vacate the notice of dismissal was at first granted, but on June 24, 1957, was denied upon rehearing (R. 328-333).

When the action was still pending in the District Court (following the first order vacating petitioner's notice of dismissal), the District Court on June 19, 1957, directed respondents to show cause why the court should not grant (a) leave to petitioner to file an amended complaint con-

taining only the first two causes of action (stripped of the third cause which caused Judge Ryan to order the action transferred to Texas), and order the action retained in the New York jurisdiction, and (b) leave to petitioner to withdraw the notice of dismissal.

Petitioner's application for the above show cause order of June 19, 1957, was timely made—less than two months following petitioner's notice of dismissal on April 26, 1957, so that respondents were not prejudiced.

The grounds for petitioner's application were:

1. That the trial court and petitioner made inadvertent mistakes in not observing that the two-year statute of limitations would bar the action in Texas, whereas the New York three-year limitation would definitely not bar the action; and that, therefore, as the action "might" not "have been brought" in Texas under section 1404 (a), Title 28, U. S. C., there was no authority for the transfer.

2. That petitioner, having eliminated in the tendered amended complaint, the third cause of action which prompted the order of transfer, there was no valid ground for transferring the action.

3. That inasmuch as petitioner was entitled to summary judgment based on the certified record in *Benton v. Blair*, the interests of justice and the convenience of the parties required that the action be tried in New York, the residence of petitioner. (The grounds for the motion are stated more fully in Brief for Appellant and Appendix in the Court of Appeals, at pp. 3-4 of the Brief.)

July 12, 1957, the District Court denied the application on the stated, erroneous ground that because of plaintiff's voluntary dismissal no action was pending (R. 327A). October 17, 1957, the United States Court of Appeals

unanimously reversed the order of the District Court, and held that the trial court should decide the motion to vacate the notice of dismissal and then consider the request to file the amended complaint and for an order retaining jurisdiction in the New York court (R. 386-388).

The record is barren of any evidence that the bar of the Texas two-year statute of limitations was considered by the District Court or the Court of Appeals or the parties, as was essential to a determination under section 1404 (a), Title 28, U. S. C., that the action could have been brought or maintained in Texas at the time instituted.

THE ABUSE OF DISCRETION BY THE DISTRICT JUDGE.

Thereupon petitioner's motion brought on for hearing by the court's show cause order of June 20, 1957, was noticed for hearing on November 21, 1957, in conformity with the decision of the United States Court of Appeals. District Judge Herlands presided. All the papers were before the court. The motion had never been adjudicated on the merits.

So that plaintiff's motion consisting of plaintiff's affidavit, and Judge Dawson's order to show cause, were properly the subject for decision in conformity with the decision of the Court of Appeals. The motion had never been adjudicated. It had been made precisely in conformity with Federal Rule 6(d), and defendant and the court knew exactly what motion was before the court for decision. And Judge Herlands should have known fully the subject matter because on November 19, 1957, he had entered the order adopting the decision of the Court of Appeals (R. 391-3). Despite the fact that the motion papers, including the affidavit, were properly before the court,

Judge Herlands erroneously declared that the motion papers were defective simply because the motion was *not repeated* in typewritten form (R. 470-471; App. 30-31). Yet, he later assumed that the papers were properly before him (App. 31-35).

The hearing had been adjourned by consent to November 26, 1957. On that date, the motion was argued, and was inconsiderately, impetuously and impulsively denied in its entirety by Judge Herlands (App. 35; R. 444-481) without the court having even read (a) the motion of plaintiff of June 19, 1957, and his accompanying affidavit (App. 7-13; R. 320-327) or (b) the "plaintiff's memorandum on motion for leave to file amended complaint, etc." filed at the hearing on November 26, 1957 (R. 394-411; Tr. of hearing, R. 443-481, App. 17-36) nor did the court read the answering affidavit of Leo T. Kissam, Esq., of November 26, 1957, consisting of 10 pages and exhibits (R. 412-442). The hearing lasted only not more than approximately thirty minutes.

Plaintiff's affidavit of June 19, 1957, consisted of nine pages and contained his motion, the tendered amended complaint, the factual reasons for the motion, the facts showing that the tortious acts of defendant Searls, in the action of *Benton* v. *Blair*, occurred as early as December 5, 1953, and June, 1954 (plaintiff's affidavit on motion for summary judgment, R. 101-102), whereas this action was not commenced until November 27, 1956, more than two years thereafter (R. 320-327). The affidavit contained the numerous cogent reasons why the action as represented by the limited two causes of action of the amended complaint (eliminating the third cause of action of the original complaint which was the reason for Judge Ryan ordering the transfer of the original action to Texas) should not be transferred to Texas, as hereinabove set forth, in-

cluding the irreparable injury to plaintiff represented by the belief that he would be forever barred from an adjudication of his claim because of the Texas statute of limitations, and plaintiff's inability to obtain service of process on defendants in New York because defendants are all residents of Texas.

Plaintiff's memorandum on the motion, consisting of 17 pages (R. 394-411) was filed with Judge Herlands at the commencement of the hearing of the motion on November 26, 1957. It treated fully the facts supporting the motion, it showed that the reason for the court's earlier order transferring the original complaint to Texas was the third cause of action alleging that the Texas judge had been the subject of influence (which third cause of action is entirely eliminated from the amended complaint), it described the ten documents relied upon by plaintiff for the motion, it showed the compelling grounds for the granting of plaintiff's motion, the law supporting plaintiff's motion, and that it would be unconscionable to deny plaintiff a trial of the amended complaint in the New York forum of plaintiff's residence, which is the only jurisdiction available to him, and that plaintiff's right to a hearing upon his claims would be forever lost if the motion should not be granted (R. 394-411).

The hearing was reported (App. 17-36; R. 443-481).

As Judge Herlands had not read plaintiff's motion and memorandum supporting the motion, he undertook to adjudicate the motion on the brief oral summary presentation by counsel, which of course did not cover the full facts (App. 17-36; R. 443-481). Plaintiff explicitly stated to Judge Herlands that his affidavit containing the motion was annexed to Judge Dawson's order to show cause in the record (R. 320-327; App. 22; R. 454-455); and the

plaintiff had stated at the oral hearing that there *were a lot of facts which he "would leave for your Honor's notation of them better on papers that will be before your Honor"* (App. 20; R. 451), so that Judge Herlands did not have in his mind all the facts stated in the motion papers in reaching his impetuous decision on the motion.

Instead of reading plaintiff's sworn motion and plaintiff's Memorandum thereon, Judge Herlands sought, at the oral hearing, to obtain *a mere summary* of the grounds for the motion. He asked that he be informed *"in headline form* what you (appellant) regard as the specific reasons why you should be relieved of this discontinuance." (App. 26; R. 462) *and then insisted on hearing from defendant's counsel—cutting off the plaintiff* (App. 27; R. 464).

Thereupon, counsel to defendant made orally certain misstatements to Judge Herlands, which Judge Herlands was manifestly unable to reconcile with the actual facts in his quick and impulsive determination, but which *misstatements he had doubtless absorbed*, as follows:

1. "That he (Mr. Benton) has made statements to your Honor which are wholly unsupported by any papers before your Honor." (App. 27; R. 464). The statement was arbitrary, it was not supported by any showing and could not be supported by any showing.

2. "There was no *such finding* by the court in Texas" (R. 465; App. 28), without stating what finding by the court in Texas he referred to. But he doubtless referred to plaintiff's statement (App. 20; R. 450) that the Court of Appeals (in *Benton* v. *Blair*, 5th Circuit) held squarely in a 16 page written opinion that the plaintiff "had established a *prima facie* case of his contract of co-partnership and it remanded the case." Such statement is absolutely correct: *Benton* v. *Blair*, 228 F. 2d 55. So that counsel to

defendants misled Judge Herlands, and the Judge did nothing to ascertain the real facts.

3. That Judge Herlands had "one piece of paper before you" meaning the mere notice of the hearing of the motion (App. 28; R. 465). The truth is that the court had before it Judge Dawson's order to show cause of June 19, 1957, and plaintiff's accompanying affidavit containing the motion (App. 7-13; R. 320-327). And it had plaintiff's comprehensive memorandum.

4. "The record shows that he (plaintiff) was not represented by one lawyer but by two lawyers". (App. 28; R. 466). The statement is misleading. Plaintiff's trial counsel, Mr. Williams, had become ill, and withdrew before the appeal was made in *Benton* v. *Blair*, and later died (R. 16-18); and plaintiff was unable to obtain other Texas trial counsel; but was able to obtain only the services of lawyer Cunningham in Houston to appear only for a pretrial hearing on March 12, 1956, in Texas, and as mere local counsel of record (R. 21). The only other legal adviser plaintiff had in the Texas case was Lawrence W. Krieger, Esquire, of New York who annexed his affidavit of good faith to plaintiff's affidavit of prejudice against the Texas judge, Judge Connally (R. 195-207). Mr. Krieger was, naturally, as a New York lawyer, ill prepared to try the action in Texas although it was thought of as an emergency measure.

5. "But every single witness besides Mr. Benton is in Texas." (App. 28; R. 466). Plaintiff has shown that the certified record in *Benton* v. *Blair* in Texas conclusively proves the tortious conduct of defendant Searls in *Benton* v. *Blair*, the subject of this action (App. 8-10; R. 321-323). And plaintiff has shown that no amount of testimony of Texans can change that result. Plaintiff has also shown

that there are approximately 10 witnesses in New York competent to testify to the facts of the case (R. 186-187).

6. "You are not going to find * * * anything in Mr. Benton's papers or our papers that has to do with the statute of limitations. You will find it in our opposing affidavit today." (App. 32). The statement is reckless, and a gross misstatement, that must have misled the court. Plaintiff's affidavit annexed to Judge Dawson's show cause order of June 19, 1957 (App. 7-13; R. 320-327), shows the facts which would bring the Texas statute of limitations into play and probably bar the claim there. In addition, "Plaintiff's memorandum on Motion for Leave to File Amended Complaint, etc." filed at the hearing before Judge Herlands showed the court that the Texas two-year statute of limitations would probably bar the action in Texas, whereas the New York three year statute of limitations would definitely not bar the action (R. 394-411). The memorandum set forth the Texas statute of limitations, and the decision of Judge Weinfeld of the United States District Court for the Southern District of New York *that even if a plaintiff be mistaken as to the law of the statute of limitations of the transferee state "plaintiff should not be exposed to such a possibility"* of the operation of the statute of limitations. *Curry* v. *States Marine Corp.*, (1953) 118 F. Supp. 234. In addition, there was before the court plaintiff's affidavit of August 6, 1957, showing that the Texas statute of limitations was not considered upon the hearing before Judge Ryan of defendants' motion to transfer (R. 350-351; App. 20).

7. "When the motion was argued before Judge Ryan, Judge Ryan, not I, asked whether any Texas statute of limitations was involved". (R. 472; App. 32). Appellant's affidavit of August 6, 1957 (App. 16-17; R. 350-351) shows:

> "Plaintiff has no recollection whatever that the Texas statute of limitations was raised by Judge Ryan, or counsel, on January 18, 1957, or at any time when the subject was considered by Judge Ryan, for if the question had been raised it would have been researched and brought to Judge Ryan's attention and treated in the briefs. There is no mention whatever of the statute of limitations in Judge Ryan's opinion, or the affidavits and briefs of the parties (before Judge Ryan). I am therefore convinced that Mr. O'Loughlin is mistaken in saying that Judge Ryan had specifically raised the question of the statute of liimtations."

There is not one word in the record of these proceedings indicating that anyone considered the question of the application of the Texas statute of limitations, until appellant's instant motion was made to relieve him from his mistake and the mistake of Judge Ryan in not noting the probable application of limitations in Texas; and, of course, the question was not raised before Judge Ryan. But even if slight mention of it could have been made there is not one word in the record indicating that it was really considered or determined; and it is hereinabove and hereinafter shown that it would most probably bar the action in Texas.

8. Defendants' counsel's statement that plaintiff would have been barred from raising the Texas statute of limitations because reargument of defendant's motion to transfer was not made within 14 days from the order of transfer (App. 33; R. 474): The statement is erroneous, and baseless, because Federal Rule 60 (b) expressly allows application to be made to correct a mistake at any time within one year.

9. "He (plaintiff) is not hurt" by the discontinuance; "there is no prejudice to it. If he has a cause of action, he can start it in New York or in Texas." (App. 33-34; R. 475-

479). That is another gross misstatement by defendants' counsel. The Texas two-year statute of limitations probably barred the action when this action was commenced. It would most certainly bar the action if brought now. Plaintiff cannot obtain service in New York on defendants, for defendants are all residents of Texas.

The foregoing numerous misstatements of material facts to the court by defendants' counsel are bound to have had their effect, as Judge Herlands freely admitted that he had not read the motion papers, or plaintiff's extensive Memorandum. During the very limited time permitted for the argument, Judge Herlands merely "GLANCED AT THE PERTINENT PAPERS AND DECISIONS." (App. 34; R. 476).

Thereupon plaintiff reminded the court that his Memorandum listed the ten documents then before the court upon which plaintiff relied (App. 34; R. 394-411, p. 10). *Judge Herlands ignored such record facts, and of course did not consider all the true facts.* He declined even to read plaintiff's affidavit containing the instant motion, which is annexed to Judge Dawson's show cause order (App. 34; R. 320-327, 477). He mistakenly proceeded upon the erroneous assumption that plaintiff had not presented his grounds for the motion in affidavit form, without examining the very motion that was before him for adjudication (App. 34; R. 477).

Thereupon Judge Herlands, without considering the carefully drawn motion in affidavit form, or plaintiff's Memorandum presented to him at the commencement of the argument, and following the short, summary argument of the parties, inconsiderately, impulsively and impetuously ruled that, even assuming all the facts stated by plaintiff in oral presentation were true, plaintiff had not

made out a case *requiring* the court to vacate the notice of dismissal and to allow the filing of the amended complaint (App. 35; R. 478).

As Federal Civil Rule 60 (b) contemplates that the District Judge should sit as a chancellor, it is at once manifest that Judge Herlands' inconsiderate, impetuous and impulsive action did not conform to that requirement of law and equity for a fair, full and informed hearing.

The court's action had doubtless been induced largely by the mistaken assertions by Mr. Kissam, *supra*, for, after his adverse ruling was given, Judge Herlands declared that plaintiff could start a brand new action in New York (App. 35; R. 478-479)—*a palpable mistake as induced by Mr. Kissam*—wholly overlooking the fact that plaintiff could not obtain service on the defendant Texans in New York.

After being reminded that there is not one word in the record indicating that the bar of the Texas statute of limitations had been noted in the earlier proceedings, Judge Herlands *assumed such fact to be correct*, but then wholly and inconsistently said that "I don't think there was a mistake" without any factual basis whatever for his conclusion (App. 36; R. 480).

Judge Herlands then concluded that, after considering all the facts referred to in argument and

> "the facts set forth *in the affidavits* here, *considering the total record*, it seems to me that this is not a case that should appeal to the conscience of the court."

The statement is erroneous, it is untrue, it was impossible for the judge to have considered all such facts. He didn't even read the moving affidavit. Yet, he denied the motion in its entirety (App. 36; R. 481; hearing of November 26, 1957).

On the same day, November 26, 1957, Judge Herlands endorsed on plaintiff's notice of the hearing of the motion pursuant to the decision of this court:

> "11-26-57. Motion denied in its entirety. SO ORDERED. Herlands, J." (R. 390).

Despite the fact that the foregoing decision and entry by Judge Herlands constituted the "order" of the court (General Rule 10, U. S. District Court), defendant served on December 4, 1957, a proposed "long form order" "so that, should an appeal be made, the Circuit Court will be fully acquainted with the *circumstances and considerations* which lead to the denial of the motion." (R. 483-484).

Before the scheduled time and date for the presentation of such long form of order for settlement on December 6, 1957, at 10 A. M., plaintiff at 9:37 A. M. on December 6, 1957, filed his notice of appeal herein. Plaintiff at the same time filed his "Objections" to defendants' submitted long form order, stated that the judgment of the court had been announced and entered on November 26, 1957, and stated that the court had not actually read the affidavits described in the long form of order. Plaintiff called attention to the fact that while the long form of order *mistakenly* recited that the court had read the affidavits of Messrs. Kissam and O'Loughlin, it *properly* did not recite that the court had read plaintiff's affidavit of June 19, 1957, annexed to the show cause order of Judge Dawson. Plaintiff further noted that he had, before 10 A. M. on December 6, 1957, filed his notice of appeal to this court. Plaintiff then urged that the long form of order "should be considered with extreme caution", because the transcript of the hearing before Judge Herlands fully showed the limited circumstances and considerations which led to the extemporaneous decision and order of the court on November 26, 1957 (App. 17-36; R. 485-489).

Upon the filing of the notice of appeal before the long form order was presented to Judge Herlands, the District Court lost jurisdiction of the matter, and could not validly enter an order stating that it did what it did not do in reaching the decision and in entering the first order on November 26, 1957. Plaintiff thus believes strongly that the presentation to Judge Herlands of the long form order for the purpose of showing a basis for his decision and order that was not present when he made his decision and entered his order is an obvious attempt to cure a fatal mistake in the impulsive decision from the bench of Judge Herlands.

Despite such written "Objections" by plaintiff, Judge Herlands signed the long form order as of *December 6, 1957*, but notice of entry was not mailed to plaintiff until *December 9, 1957*.

The long form of order recites that the court read and filed

> "the affidavit of Leo T. Kissam, sworn to November 25, 1957, together with the exhibits annexed thereto, and the affidavit of Joseph M. O'Loughlin, sworn to November 25, 1957, all in opposition to said motion, and after hearing Thaddeus G. Benton appearing pro se, in support of said motion, and Kissam & Halpin, Esquires, by Leo T. Kissam of counsel in opposition to said motion, and upon the stenographer's minutes of the argument of the said motion filed herein * * *".

It then recites that the said motion is denied in its entirety, and is dated as of *December 6, 1957*. It had already been *denied by written order on November 26, 1957*.

It is thus evident that Judge Herlands had reached his decision on the important motion before him impulsively and impetuously, without considering all the facts con-

tained in the carefully written affidavit and Memorandum of the plaintiff. It was natural for him to persist in his order of November 26 in acting upon the long form order on December 6, 1957; but inasmuch as his decision had been firmly made on November 26 it was irregular for him some ten days later to attempt to show a basis for his decision that did not exist on November 26, *i. e.*, the reading of the defendants' counsel's affidavits. *And the record stands clear and positive that he never read plaintiff's moving affidavit and extensive Memorandum thereon.*

The foregoing facts of the proceedings before Judge Herlands are extremely significant as supporting plaintiff's contention that the District Judge not only committed gross error, but that he abused any real discretion he may have, that he did not act judiciously in conducting a real hearing, and that he acted impulsively and impetuously, and erroneously.

THE DECISION OF THE COURT OF APPEALS.

The United States Court of Appeals held (App. 2A) that

> "*It is not at all clear* that the applicable limitation period would not be the same whether the case were tried in the New York or Texas District Court (See Headrick v. Atchison, T. & S. F. Ry. Co., 182 F. 2d 305 (10 Cir., 1950). *It is also not at all clear* from the record that the appellant was not aware of the Texas statute at the time he filed the notice of voluntary dismissal. In any event, ignorance of the Texas limitation period on the part of appellant, an experienced lawyer, is not under the circumstances here disclosed the kind of 'mistake, inadvertence, surprise, or excusable neglect' contemplated by rule 60 (b)".

It is submitted that the Court of Appeals committed grievous error in its three conclusions, ignoring the law as declared by this court, and ignoring the broad purpose of rule 60 (b).

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The assumption that the "applicable limitation" period might be the same whether the action is tried in New York or Texas *is in defiance of the law as repeatedly declared by this court*, viz., that the law of the state in which the federal court sits is the law of the case; and the Court of Appeals mistakenly relied upon the isolated decision in the *Headrick* case, 10th circuit, which is contrary to fundamental law as determined repeatedly by this court.

2. Inasmuch as the Texas two-year limitation would have barred the action in Texas, and it "might" not "have been brought" there, the order transferring the action to Texas was void.

3. In holding that mistakes of law by the court and a party are not within the purview of rule 60 (b), the Court of Appeals' ruling is a perversion of the manifest purpose of the rule as written by this court.

4. The Court of Appeals abdicated its duty, in not actually adjudicating the issues, and by merely declaring "it is not at all clear" etc., and that "it is not at all clear" etc., without affirmatively determining a basis for its conclusion.

5. District Judge Herlands grossly abused any discretion he might have had.

ARGUMENT.

I. The Texas Two Year Statute of Limitations Would Have Barred the Action, and As It Therefore, "Might" Not "Have Been Brought" in Texas, the Order Transferring the Action There Was Void.

Article 5526, Title 91 on Limitations, Vernon's Civil Statutes of Texas annotated, provides:

> "Actions to be Commenced in Two years.
>
> There *shall be commenced* and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions or suits in court of the following description:
>
> 1. Actions of *trespass and injury* done to the estate or the *property of another.*
>
> 2. Actions for detaining the personal property of another.
>
> 3. Actions for taking and carrying away the goods and chattels of another.
>
> * * *"

Certain of the tortious acts of defendant Searls were committed in Texas on December 5, 1953, when defendant's Blair's answer to the complaint by Searls, was filed, on November 19, 1953, when defendant Searls filed the stipulation of Blair not to assign any part of the partnership assets prior to the final disposition of that cause, and in June, 1954, when Searls took the deposition of plaintiff in that action and when Blair gave his deposition. As this action in this court was not commenced until November 27, 1956, by the service of summons—more than two years after such tortious acts of defendant Searls were com-

mitted, it is probable that the two year statute of limitations in Texas applicable to actions for injuries to property would be held applicable—whereas the New York statute of limitations of three years for injuries to property assuredly could not bar this action. (For such facts, see pp. 3-4 of plaintiff's affidavit attached to court's show cause order of June 19, 1957; R. 320-327; App. 7-13.)

The cause of action accrues at the time the tort is committed—not at the time discovered or when actual damage results or is ascertained. *Crawford* v. *Davis*, Civ. App. Tex., 148 S. W. 2d 905.

It is of course expected that as defendant Searls' principal tortious acts were committed in Texas, and as plaintiff's cause of action arose in Texas, the Texas two year statute of limitations would be held to be applicable—the transferee forum, if the action be transferred.

It is to be expected that the Texas courts would hold that the Texas two-year statute of limitations is a complete bar to such action in any Texas court, regardless of how the action arose; and that the Texas courts would impose the bar whether or not the defense were raised by defendants. A cogent reason therefor might well be this fact: Prior to 1939 in Texas it was necessary that a defendant plead the statute as a defense. But, by Article 1939, 46th Leg., p. 201, sec. 1, the following article of Texas law was *REPEALED*:

Article 5540, Title 91, Limitations, Vernon's Civil Statutes of the State of Texas annotated, Vol. 16:

> "*Limitation must be pleaded.* The law of limitation shall not be available in any suit unless it be specifically set forth by the party who in his answer invokes it as a defense."

It therefore seems likely that a Texas court, on a cause of action arising in Texas, would construe the law to be an absolute bar to an action commenced more than two years after the commission of the tort, whether or not the defense were interposed by the defendant.

The statute, by the word "trespass" includes all tortious acts amounting to a transgression of the rights of another as to his property, although some act must be done. *Davies* v. *Texas Central Ry. Co.*, 62 C. A. 599, 133 S. W. 295. It would undoubtedly cover the causes of action pleaded in the amended complaint.

So that, there being substantial risk that plaintiff's rights would be held by the Texas court to be barred, there is substantial and effective reason why the action should not be transferred. As stated so well by the District Court in New York (Judge Weinfeld) in *Curry* v. *States Marine Corp. of Del.*, D. C. N. Y. 1953, 118 F. Supp. 234:

> "If the motion were granted, this would result according to the defendant in the dismissal of the plaintiff's suit since it was not brought within one year period under the Louisiana law. WHILE DEFENDANT MAY BE WRONG ON THE LAW, PLAINTIFF SHOULD NOT BE EXPOSED TO SUCH A POSSIBILITY."

Certainly the plaintiff in this action should not be exposed to the great risk that the Texas two year statute of limitations would bar his action, in the light of the vast uncertainty of the application of conflict of laws.

In *Broughton* v. *Shoulders*, 116 F. Supp. 391 (W. D. Ky. 1953), an action instituted in New York arising out of an automobile collision in Kentucky, was transferred to Kentucky. It was held that the "matter of jurisdiction has

been determined by the judge of the Western District of New York and is the law of the case"; that the "Western District of Kentucky therefore becomes both the place where the cause of action arose *and the forum in which the litigation* is to be concluded"; that

> "since the lexi fori and the lex loci are both in Kentucky we must look to the authorities of the court of last resort in this state to determine what should be the proper ruling on the motion to dismiss. It seems well established that the law of the forum governs, whether the action is ex contractu or ex delicto. The plaintiff's complaint shows a common law right of recovery and the one year statute of limitations (of Ky.) necessarily controls. Louisville & Nashville R. R. Co. v. Burkhart, 154 Ky. 92, 157 S. W. 18, 46 L. R. A., N. S., 687; Lewis v. Reconstruction Finance Corp., 85 U. S. App. D. C. 339, 177 F. 2d 654; Travelers Insurance Co. v. Mahon, 273 Ky. 691, 117 S. W. 2d 909; Wells v. Simonds Abrasive Co., 345 U. S. 514, 73 S. Ct. 856."

In *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 73 S. Ct. 856, in an action brought in Pennsylvania federal court for injuries sustained in Alabama caused by a Pennsylvania corporation, it was held that the Pennsylvania statute outlawing such action after one year governs—the law of the forum, despite the fact that the Alabama wrongful death statute permitted a suit within two years. It was held that the Pennsylvania statute governing conflicts of law does not violate the full faith and credit clause of the Constitution. So that in the case at bar, the New York three year statute would govern if New York remains the forum; but if the action is transferred to Texas, and Texas becomes the forum, there can be little or no doubt that the Texas courts would hold that the Texas statute of limitations applies.

II. Neither the District Court nor Plaintiff Awakened to the Hazard of the Texas Statute of Limitations Until After Plaintiff Discontinued the Action.

This fact is shown above in the Statement of the Case, and by plaintiff's two affidavits, the first supporting the motion, and the second filed thereafter (App. 3rd and 4th items, pp. 7-16).

There is not one word in the record indicating that anyone had thought of the bar of the Texas statute of limitations, until plaintiff's motion for relief was served. If it had been raised, certainly plaintiff would have cited the Texas statute and the New York statute, as a cogent reason why the action should not have been ordered to be transferred. The attempted showing by Mr. O'Loughlin, of counsel for defendants, that Judge Ryan raised the question is, therefore, wholly incredible—and as incredible as are the numerous representations made to Judge Herlands by Mr. Kissam orally at the hearing on this motion—shown hereinabove to be misrepresentations.

The most convincing proof that the Texas statute of limitations was not observed by the parties or by the court is the fact that Judge Ryan's opinion is barren of any suggestion of it.

Such inadvertence and mistake of fact, and of a legal consideration, are perfect reasons for relief under Federal Rule 60(b), and should be controlling in the disposition of the instant motion.

Moreover, the basis of Judge Herlands' decision was *his unqualified assumption that the accrual of the cause of action occurred more than the two years before the commencement of this action* (App. 31, 36). This court will, therefore, accept that as a fact.

III. The Transfer Statute (Sec. 1404, Title 28, U.S.C.) Does Not Permit the Transfer of the Action to Texas Because It Is Not a "District or Division Where It Might Have Been Brought."

The statute reads:

> "(a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"

The statute is positive that an action may not be transferred to a district where it might *not* have been brought. That limitation is controlling, for we have shown that because of the Texas two-year statute of limitations this action was barred in Texas. That limitation has been uniformly recognized by all the courts by the innumerable reported decisions in cases where the statute of limitations of the transferee district would bar the action but could be waived; but in Texas the bar of the statute of limitations is absolute.

IV. The Law of the State in Which the Federal Court Sits (Texas) Is the Law of the Case If the Action Be Transferred to Texas; and the Decision in Headrick v. Atchison Is an Isolated, Single and Incorrect Decision.

Respondents' reliance solely upon *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950), for the alleged point that the statute of limitations of the transferror state governs in a removal action—and not the statute of limitations of the transferee state—is erroneous and abortive. The decision cannot stand—certainly not on the facts of this case. It is overcome by numerous Supreme Court decisions to the contrary.

Appellant has shown that the Texas laws bars the commencement and prosecution of any such action in Texas after two years from the time the right of action accrued, and that the defense need not be pleaded. Such law is thus a substantive law in Texas, and there is no power in Congress to change that law as to actions to be tried in the Texas forum.

The law of the forum *where the court sits*—and where the action is litigated and tried—governs. *Wells* v. *Simonds Abrasive Co.*, 73 S. Ct. 856-858, 344 U. S. 815; 345 U. S. 512, 97 L. Ed. 634, 1211; *Hartwell* v. *Piper Aircraft Corp.*, 92 F. Supp. 271 (M. D. Pa.); *Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940, 942 (9th Cir.).

In a New York court, the New York two-year statute of limitations governs for an action based on a Pennsylvania wrongful death in which state the limitation period is one year, but if the forum were Pennsylvania, there could be no doubt that the Pennsylvania statute of limitations would apply. *Panzeron et al.* v. *Heath et al.*, 95 N. Y. S. 2d 660, 662, 197 Misc. 847.

In a federal court action, the statute of limitations of the state *in which the court sits controls*—not the statute of the state where the tort was committed. *Carpenter* v. *Rohm & Haas Co., Inc.*, 75 Fed. Supp. 732, 734 (Del.); *Florida Wholesale Drug, Inc.*, v. *Ronson Art Metal Works*, 110 F. Supp. 573, 574, 575 (N. J.).

In *Wells* v. *Simonds Abrasive Co., supra*, it was held that, in an action brought in Pennsylvania, the Pennsylvania conflict of laws rule does not violate the full faith and credit clause, there being no reason to graft an exception, as concerns foreign statutory rights, upon the general rule that the full faith and credit clause *does not compel the forum state to use the period of limitations of a foreign state.*

That is the Supreme Court's decision. Hence, in the action at bar, if it be transferred to Texas, the Texas courts must apply the statute of limitations of Texas.

The rule is applicable in Texas. *Griffin* v. *McCoach*, (1941) 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, was an action in the Texas federal court, involving the question whether the estate or a trustee was entitled to certain insurance proceeds paid by Prudential Insurance Co. The court held:

> "For the reasons given in *Klaxon* v. *Stentor Electric Mfg. Co.*, No. 741, this term, decided today (313 U. S. 487, ante 1477, 61 S. Ct. 1020) we are of the view that the federal courts in diversity cases *are governed by the conflict of laws rules of the courts in which they sit.*"

Further, the Supreme Court said:

> "If, upon examination of the Texas law, it appears that the courts of Texas would refuse the enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of interference with local law, such refusal would be, in our opinion, within the constitutional power of the Texas courts. Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned, *but that principle excepts claimed rights so contrary to the state of the forum as to subvert the forum's views of public policy.* * * *
>
> "Where this court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the 14th amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy." (citing cases) * * *
>
> "It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement."

Here, the state of Texas has expressed its public policy requiring all actions to be "commenced and prosecuted within two years after the cause of action shall have accrued", and Texas has thus said that it will not enforce the rights involved in this action if Texas should become the forum.

Beale on "The Conflict of Laws" (1935), states the rules:

> "Section 604.6. *Statute of Limitations in federal courts.* In an action at law a federal court will apply, in the absence of any applicable federal statute, *the statute of the state in which it sits. Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (1917); *U. S.* v. *Sligh*, 24 F. 2d 636 (1928); *Watkins* v. *Madison Trust and Deposit Co.*, 24 F. 2d 370 (1928); *Weems* v. *Carter*, 30 F. 2d 202 (1929)."
>
> "Section 584.1, p. 1600.
>
> "It has now become axiomatic that substantive matters are governed by the foreign law, and that procedural matters, or, as it is more usually expressed, *matters relating to the remedy are governed by the law of the forum.*"
>
> "Section 603.1. *Statute of Limitations of Forum.*
>
> "That the statute of limitations of the forum is the applicable law of limitations is so well settled, in Anglo-American law at least, as to be beyond dispute. *M'Clung* v. *Silliman*, 5 Peters 270, 7 L. Ed. 190 (1830); *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. Ed. 939 (1867); *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 32 L. Ed. 1080" (and cases in Illinois, Kentucky, Louisiana, Missouri, Mississippi, New York, Oklahoma and Vermont).

For the same principle, *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, was followed in *Klaxon* v. *Stentor*

El. Mfg. Co., (1941) 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, decided the same day as *Griffin* v. *McCoach*, *supra*.

The *Klaxon* case involved directly the question whether a federal court in a diversity case must follow the conflict of laws rule prevailing in the *states in which they sit*. It involved a suit in the Delaware federal court on a contract executed in New York, and the Delaware federal court allowed interest on the contract under the New York law. The sole question was whether the New York law was applicable, or the Delaware Law. The Supreme Court held:

> "The conflict of laws rule to be applied by the federal court in Delaware must conform to those prevailing in Delaware state courts." (citing *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487). "Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. *It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.* Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. * * * *And the proper function of the Delaware court is to ascertain what the state law is, not what it ought to be.*"

The decision was reversed, for decision in conformity with the law of Delaware.

Further authorities that the law of the forum governs are:

Levy v. *Simmons et al.*, 249 S. W. 2d 808 (Ky.).

Merchants & Planters Nat. Bank v. *Appleyard*, 77 S. E. 2d 783, 785, 238 N. C. 145.

Foley v. *Pittsburgh-Des Moines Co. et al.*, 68 A. 2d 517, 363 Pa. 1.

Zellmer v. *Acme Brewing Co.*, 184 F. 2d 940, 942.

Fla., Wholesale Drug, Inc., v. *Ronson Art Metal Works, Inc.*, 110 F. Supp. 573-5.

Anderson v. *Linton*, 178 F. 2d 304, 310 (7th).

Guarantee Trust Co. v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, is another leading authority, following the *Erie, Klaxon* and *Griffin* decisions, *supra*. It was held that if a plea of limitations would bar a suit in a state court for equitable relief, a federal court whose jurisdiction rests upon diversity of citizenship ought not to afford relief; that the federal courts have not differentiated in

> "their regard for state law between actions at law and suits in equity. Although section 34 of the Judiciary Act, 1789, 1 Stat. 73, 92 c. 20, 28 U. S. C. A., Sec. 725, 8 F. C. A., Title 28, sec. 725, directed that the laws of the several states * * * shall be regarded as rules of decisions in trials at common law * * * this was deemed, constantly for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits."

> "Such particular rules of local law, however, do not in the slightest change the crucial consideration *that if a plea of the statute of limitations would bar recovery in a state court, a federal court ought not to afford recovery.* * * *"

It held that even before *Erie* v. *Tompkins*, the federal courts relied on statutes of limitations "of the state *in which they sit*. In suits at law state limitations statutes were held to be 'rules of decision' within section 34 of the Judiciary Act of 1789 and as such applied in trials at common law * * *

whenever that law is authoritatively declared by a state, whether its voice be the legislature or its highest court, such law ought to govern litigation *founded on that law, whether the forum of application is a state or a federal court* and whether the remedies be sought at law or may be had in equity."

The *York*, *Erie* and *Klaxon* authorities, *supra*, were followed by Judge Murphy (D. C. N. Y.) in a long, well written opinion in *Warner* v. *Republic Steel Corp.*, 103 F. Supp. 998, 1004 (1952), *in holding that the conflict of laws rule of the state in which the federal court sits must govern.*

There is thus no question that if this action be not retained in this jurisdiction, but be transferred to Texas, the Texas statute of limitations would bar the action, and that appellant's right of action would be destroyed; and appellant would be denied the Constitutional and statutory right to prosecute his claim in the jurisdiction of his residence.

Thus, the impetuous denial by Judge Herlands of plaintiff's motion would represent the destruction of plaintiff's right of action valued at $1,000,000, and would do violence to the "interest of justice" test in the transfer statute. Judge Ryan's and appellant's and his counsel's mistake of the law, and inadvertence, is properly the subject of correction by the authority of F. R. C. P. 60(b).

A cogent, confirmatory authority for the fact that the statute of limitations of the transferee state would apply consists of the innumerable decisions of the United States District Courts refusing to transfer cases unless the defendant should expressly waive the statute of limitations of the transferee state; and, in this case, the Texas statute of limitations is one that cannot be waived.

V. While Purporting to Assume All Plaintiff's Statements in Argument to Be True, and That He Had Considered the Whole Record (Which He Had Not Done), Judge Herlands' Decision Inconsistently and Contrarily, and Impulsively, Was That Judge Ryan and Appellant Had Not Made a Mistake in Overlooking the Application of the Texas Statute of Limitations—Without Any Basis Whatever Therefor. The Judge Was Misled by the Misrepresentations by Appellees' Counsel.

Those factual statements are abundantly proved by the transcript of the hearing (App. 34-37).

The written record shows the most impulsive and impetuous, and uninformed and inconsistent action imaginable by a trial judge, and one largely induced by misrepresentations of material facts by appellees' counsel. To say that appellant did not receive a fair hearing, on the facts of record would be to minimize the gravity of the trial judge's actions.

VI. The Court of Appeals Did Not Adjudicate the Issues, But Reached Its Conclusions on a Negative Assumption that the New York Statute of Limitations Might Apply Whether the Action Be Tried in New York or Texas, in Contradiction of Fundamental Law As Repeatedly Announced by This Court.

The Court of Appeals' statement that "It is not at all clear" that the applicable limitations period would not be the same whether the case were tried in New York or Texas District Court is a simple avoidance of adjudication and avoidance of duty to determine a critical issue.

It is abundantly shown hereinabove by controlling decisions of this court that the statute of limitations of Texas

where the case would be tried would control. It is Texas, and not the federal government that has plenary authority to determine what actions may be maintained in Texas; and the effect of the decision below is to deny to Texas its authority.

VII. Judge Herlands Grossly Abused Any Discretion He Could Have Had. While Purporting to Assume All Plaintiff's Statements in Oral Argument to Be True, and That He Had Considered the Whole Record (Which He Had Not Done), Judge Herlands Decision Inconsistently and Contrarily, and Impulsively, Was That Judge Ryan and Appellant Had Not Made a Mistake in Overlooking the Application of the Texas Statute of Limitations—Without Any Basis Whatever Therefor. The Judge Was Misled by the Misrepresentations by Appellees' Counsel.

Those factual statements are abundantly proved by the transcript of the hearing (App. 34-37).

That written record shows the most impulsive and impetuous, and uninformed and inconsistent action imaginable by a trial judge, and one largely induced by misrepresentations of material facts by respondent's counsel. To say that petitioner did not receive a fair hearing, on the facts of record as disclosed in petitioner's brief in the court below, would be to minimize the gravity of the trial judge's actions.

Even if Judge Ryan had inquired into the possible application of the Texas statute of limitations, the controlling fact is that the judge and the plaintiff had made a mistake in not recognizing that the Texas law would bar the action in Texas.

Certainly the District Court would not have ordered the action transferred to Texas if it had known that the

Texas statute of limitations would bar the action, for sec. 1404, Title 28, U. S. C., did not authorize such a transfer, as the action could not "have been brought" in Texas. Therefore, a mistake occurred, for even if the question had been raised there was a mistake of fact and law in not observing that the action would be barred.

Certainly it is not in the interest of justice to force a plaintiff, a New York citizen, having the right to file his action in New York within the time allowed there, to litigate his claim in Texas where it would be barred. That is a complete answer to appellees' claim that Judge Ryan had inquired about limitations; and respondents have not sustained their assertion that Judge Ryan did inquire into the question, and they have not even attempted to show facts or law that the Texas limitation period is not operative.

Judge Herlands did not read petitioner's moving affidavit, or memorandum, or any of the ten documents upon which he expressly relied, but, after impulsively announcing his decision from the bench on November 26, 1957, tried to cure the defect on December 6, 1957 (after petitioner had filed notice of appeal from the order of November 26, 1957), by entering a long form order reciting that the court had read the affidavits of Messrs. Kissam and O'Loughlin *which it had not done when reaching its decision*. The court's glaring error and abuse of his discretion is proved by the fact that he did not at any time read petitioner's moving affidavit, his memorandum, or the ten documents in the record upon which he relied (App. 8-13; 17-36).

In an endeavor to excuse their inducement of the court to sign a long form faulty order after plaintiff's notice of appeal was filed, respondents cited the cost bond reciting that the appeal was from the long form or-

der of December 6, 1957, whereas they should have correctly informed the court that the notice of appeal was actually from the order of the court of November 26, 1957 (R. 482). The long form order was an obvious attempt to cure a fatal mistake in the impulsive decision of Judge Herlands from the bench, and petitioner has referred to it as proof of the judge's abuse of discretion in his impulsive action of November 26, 1957.

The court's impetuous decision was induced largely by respondent's counsel's misstatements of nine critically material facts and the court did not inquire into or resolve the true facts. Yet his conclusions are permeated with reflections showing that he had absorbed such erroneous, critically material facts.

Judge Herlands *assumed that the statute of limitations had not been considered before Judge Ryan*, but thereupon contrarily and wholly inconsistently, and without any factual basis whatever concluded: "I don't think there was a mistake." (App. 36, R. 480). His judgment therefore was capricious, and contrary to the facts he actually assumed.

With utter abandon, he declared that he had considered

"*the affidavits here*" and "*the total record*"

which is simply untrue. It was impossible for him to do it in less than the half hour of hearing counsel (App. 36; R. 481).

There is especial significance in the fact that in respondent's reply brief, their counsel could not, or even attempt to, excuse himself of his misstatements of critically important facts to Judge Herlands which induced the judge's decision.

Such a hearing, with all the recorded misstatements and misrepresentations inducing the court's impulsive action, is conclusive that the court abused any discretion it might have had.

Petitioner was denied the fair hearing to which he was entitled, and the court's erroneous judgment should be reversed.

VIII. Federal Rule 60 (b) Affords Relief from Mistakes of Law As Well As Facts, It Should Be Construed Liberally, and All Doubt Should Be Resolved in Favor of the Applicant for Relief to the End of Securing a Trial upon the Merits.

Rule 60 (b) was taken almost literally from section 473 of the California Code. The California decisions recognized that section 473 was a remedial statute and is to be construed liberally and broadly (*Moore's Federal Practice*, Second Edition, volume 7, par. 60.10 (6)).

Moore states further:

> "The mistake upon which relief may be granted may *be mistake of law as well as mistake of fact* and need not be mutual."

Cases cited are:

Mitchell v. *Calif. & O. C. SS*, (1909), 156 Cal. 576, 105 Pac. 590; *Waite* v. *Southern Pac. Co.*, (1923) 192 Cal. 467, 221 Pac. 204; *Peterson* v. *Holden*, (1920) 45 Cal. App. 278, 187 Pac 99; *Kammerer* v. *Marino*, (1924) 66 Cal. App. 720, 226 Pac. 680; *Roehl* v. *Texas Co.*, (1930) 107 Cal. App. 708, 291 Pac. 262; *J. A. Vaughan Corp.*, v. *Title Ins., etc., Co.*, (1932) 123 Cal. App. 709, 12 P. 2d 117. *where the attorneys were mistaken as to the law.*

Moore states further:

> "The California courts have also liberally construed the words 'excusable neglect' and 'inadvertence' ". (Moore, p. 18.)

Any and all doubt should be resolved in favor of the applicant—the petitioner here: *Jergins* v. *Schenck*, (1912) 162 Cal. 747, 124 Pac. 426:

> "ANY DOUBT THAT MAY EXIST SHOULD BE RESOLVED IN FAVOR OF THE APPLICATION, TO THE END OF SECURING A TRIAL UPON THE MERITS. The appellate court will therefore be less inclined to reverse an order granting, than one refusing an application to open a default. Indeed, the cases in which this court has held that such relief was improperly granted are very rare; while in a number of instances an order refusing to open the default has been reversed."

Moore's Federal Procedure shows further (sec. 60.10 (9)):

> "Construction of original rule 60 (b) that was warranted by California decisions.
>
> From the California decisions it was reasonable to construe original rule 60 (b) as follows:
>
> 1. *The rule is remedial in nature and should be construed liberally.*"

The Rule Applies to Mistakes of the Court As Well As to Mistakes of Parties and Counsel.

The original rule 60 (b) provided for the relief from the mistake of the litigant only, the words being "*his* mistake, inadvertence" etc., but the word "his" was eliminated in the rule as it reads now, *so as to include the mistake of the court or the party* (Moore's, par. 60.18 (3); also p. 236).

Moore urges that "the courts should and do give a liberal construction to rule 60 (b)", citing numerous cases (Par. 60.18 (8)).

This Court long ago held expressly that "this court possesses the power to reinstate any cause *dismissed by mistake.*" *The Palmyra*, (1827) 12 Wheat. 1, 6 L. Ed. 531. There, an appellate court dismissed an appeal on the ground that no final decree had been entered in the court below, but at the next term of court a corrected transcript was adduced showing that there had been a final decree which the clerk, through mistake, had failed to include in the record, and the appellate court permitted the reinstatement of the appeal.

In *Robbins* v. *Pitcairn*, (N. D. of Ill. 1940) 3 Fed. Rules Serv. 60 b. 21, case #2 (Judge Barns), it was held that the court may relieve a party from an order against him through an excusable *mistake of law* on the part of his attorney as to the jurisdiction of the court. The court set aside its order dismissing the action for want of prosecution, by reason of the mistake of law of the attorney for the plaintiff.

Judge Hincks when United States District Judge for the District of Connecticut in 1940 held in *Nachod & U. S. Signal Co.* v. *Automatic Signal Corporation*, 32 F. Supp. 588 (before the rule 60(b) was amended) that an order may be set aside for the mistake or inadvertence of the party only. The rule now covers any mistakes by the court, party or counsel; and in this action there was involved the mistake of the court, appellant and counsel.

In *Stentor Electric Manufacturing Co.* v. *Klaxon*, (D. Del. 1939), Fed. Supp. 425, the court amended the judgment on a breach of contract action to include interest so as to comply with the law of the appropriate state. It was affirmed (C. C. A. 3rd), 115 F. 2d 268.

Judge Leibell similarly held that failure to include interest in a judgment (error of law) may be corrected on motion as an "oversight or omission" under rule 60 (b), *Rigopoulas* v. *Kernan*, (S. D. N. Y. 1943) 53 F. Supp. 829, citing the *Stentor* decision, *supra*, and *Quinn* v. *Sigretto*, 229 App. Div. 727, 241 N. Y. S. 835.

The broad and liberal purpose of rule 60 (b) was recognized by Chief Judge Clark, in holding that the court's power to grant an amendment of a complaint after affirmance of a dismissal thereof is found in amended rule 60 (b). See concurring opinion in *Feuerstein* v. *Zukor*, (2nd Cir., 1949) 174 F. 2d 371; see also to same effect, *Von Wedell* v. *McGrath*, (D. C. N. J., 1951) 100 F. Supp. 434, 16 F. Rules Serv. 15 a-24, case 1, affirmed 180 F. 2d 716, certiorari denied (1950) 340 U. S. 816.

The authority of the *Feuerstein* decision is parallel to the situation presented on this appeal. In the *Feuerstein* case the court had affirmed the dismissal of the action; *here there was only a voluntary dismissal.* The decision of the court below that the mistake in this case is not the kind of "mistake, inadvertence" contemplated by the rule is, therefore, contradictory of Chief Judge Clark's opinion in the *Feuerstein* case, and should be withdrawn.

It is thus shown that the mistake or inadvertence by the court, appellant and counsel in not observing the application of the Texas statute of limitations is a simple mistake of fact and law, and that appellant should not be forever deprived of his substantive rights by reason of such mistake.

The Court's conclusion (without expressed analysis of the facts) that Judge Herland's "discretion was not improperly exercised here" is erroneous. It would condone the most impulsive, uninformed, precipitous, impetuous

and inconsiderate exercise of a discretion imaginable by a trial court. His declination to read the motion and accompanying affidavit, the papers made a part thereof and the brief—and in accepting *the facts as misrepresented to him in argument by appellee's counsel*—is as fatal as would be the action of a trial judge, in a criminal case, in omitting to read the indictment or the documentary evidence. Judge Herlands' action reeks with such contradictions, inconsistencies, misinformation, and lack of knowledge of the facts as to compel the conclusion that he abused his discretion. His declination to inform himself of all of the facts, after listening to facts as misrepresented by appellee's counsel, is wholly inimical to a fair hearing. His actions do not admit of any other conclusion. The Supreme Court reconfirmed the rule in *Klapprott* v. *U. S.*, 335 U. S. 601, 93 L. Ed. 266, in referring to rule 60(b):

> "Fair hearings are in accord with elemental concepts of justice * * *."

It is the prevailing practice of the District Judge sitting in motion court where 100 to 150 motions are called on motion day to hear very brief argument, and then to say "I'll take the papers", meaning that the court intends to act considerately upon all the papers and with informed discretion obtained therefrom, which was lacking in this case. Instead Judge Herlands was influenced by the facts misrepresented to him by appellee's counsel, as shown in our briefs.

Certainly the impulsive and uninformed action of Judge Herlands does not constitute the informed discretion required by the rule, for he did not read the pertinent papers then before him or on file, and was misguided by misrepresentations of critically material facts by appellee's counsel. It cannot be said, therefore, that he was not in-

fluenced by certain of the facts as misrepresented, or that he considered the correct facts as to which he saw fit not to inform himself. He did not take time to inform himself of all the facts, or the true facts.

We submit that when the acts of Judge Herlands are analyzed in the light of the facts as misrepresented to him, and all the credible facts, the facts thereof compel the conclusion that he did abuse his discretion.

The best proof that petitioner and the District Court were not aware of the Texas limitations is the affidavit of appellee's counsel. Mr. O'Loughlin (Appellee's Appendix, p. 65). While petitioner is convinced that Mr. O'Loughlin is mistaken in declaring that Judge Ryan raised the question, Mr. O'Loughlin freely admits on oath that appellant "made no claim that any such question was involved in this case", thus proving that appellant had made the mistake through inadvertence of overlooking the application of the Texas statute of limitations. Certainly the appellant would have presented the facts and the law if it were known that the Texas limitations would apply, for in such event there would have been no authority to transfer the action.

And Judge Herlands freely assumed that "there is not one word in this record anywhere that the statute of limitations was considered by Judge Ryan or by petitioner prior to appellant's motion for relief under rule 60 (b)". (Appendix 36).

Judge Herlands' assumption on that point should be controlling; and it proves his capricious action in ruling that there was no mistake, in effect—*a totally irreconcilable and contradictory position* (App. 36).

There is thus no reasonable or logical basis for doubting that the petitioner and the court had not considered

the Texas limitations, until appellant sought relief under rule 60 (b). But even if there were some question of doubt, it is wholly immaterial because appellant has shown that, as matter of law, the District Court made a mistake in not observing that the Texas limitations would have prevented the action from being brought in Texas, and that there was thus no authority to transfer the action.

The policy of the law and of rule 60 (b) requires that legal rights and the right of trial be preserved as against mistake and inadvertence; rather than that they be destroyed as a result of an unwitting act or inadvertence of the trial court and of the plaintiff.

We most sincerely urge that the court below omitted to make the *adjudication* of the critical questions involved, on the facts and the law; and submit that, upon such adjudication, it must be concluded that the order of Judge Herlands should be reversed to prevent a travesty upon justice.

CONCLUSION.

It is respectfully submitted that the District Court and the Court of Appeals have ignored the rule, long established by this court, that the statute of limitations of the state of the forum governs, and that if the transfer stands in this action an erroneous judgment of the court will destroy petitioner's rights; that the Court of Appeals has ignored the limitation of section 1404 (a), Title 28, U. S. C., that an action may not be transferred to a state where it might not have been commenced; that the District Judge abused his discretion in applying Federal Rule 60 (b); and that the Court of Appeals failed to make a real adjudication of the issues as required.

Unless this court reviews and reverses the decision below, petitioner's rights to a Constitutional adjudication on the merits of his action against respondents will be forever lost, by the mistake and inadvertence of the court and counsel, which it is the avowed purpose of Federal Rule 60 (b) to prevent.

Respectfully,

McNally and Krieger,
230 Park Avenue,
New York, N. Y.,

Thaddeus G. Benton,
77 Park Avenue,
New York, N. Y.,
Attorneys for Petitioner.

Neilson Olcott,
1 East 42nd Street,
New York, N. Y.,
Of Counsel.

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 314, October Term 1957

Argued April 28, 1958 Decided May 28, 1958

Docket No. 24971

THADDEUS G. BENTON,
PLAINTIFF-APPELLANT,

VS.

VINSON ELKINS, WEEMS AND SEARLS ET AL.,
DEFENDANTS-APPELLEES.

Before Clark, Chief Judge, Hincks and Stewart, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, William B. Herlands, Judge, denying the appellant's motion to withdraw the prior voluntary dismissal of his complaint, to set aside an order transferring the action to the United States District Court for the Southern District of Texas, and for leave to file an amended complaint. *Affirmed.*

Thaddeus G. Benton, New York City, Plaintiff *Pro Se* (Lawrence W. Krieger of McNally and Krieger, and Neilson Olcott, New York City, on the Briefs) for Plaintiff-Appellant.

Leo T. Kissam, of Kissam and Halpin, New York City (Joseph M. O'Loughlin of Kissam and Halpin, New York City on the Brief) for Defendant Appellee David T. Searls.

Per Curiam.

Commenced in the Supreme Court of the State of New York, the appellant's tort action was removed to the United States District Court for the Southern District of New York by reason of diversity of citizenship. That court, pursuant to motion, transferred the action to the United States District Court for the Southern District of Texas in accordance with the provisions of 28 U. S. C., section 1404 (a). The appellant then served and filed a notice of voluntary dismissal pursuant to rule 41 (a) (1), F. R. Civ. P.

This is an appeal from the denial of appellant's subsequent motion, filed pursuant to rule 60 (b) (1), F. R. Civ. P., to withdraw the notice of voluntary dismissal, for an order vacating the order transferring the action to the District Court in Texas, and for leave to file an amended complaint.

Motions brought under Rule 60 (b) invoke the discretionary power of the District Court. *Fischer* v. *Dover Steamship Co.*, 218 F. 2d 682 (2 Cir. 1955); *Smith* v. *Kincaid*, 249 F. 2d 243 (5 Cir. 1957). That discretion was not improperly exercised here. The asserted basis for the motion was the appellant's tardy discovery of the Texas two-year statute of limitations in tort actions. It is not at all clear that the applicable limitation period would not be the same whether the case were tried in New York or Texas District Court. See *Headrick* v. *Atchison, T. & S. F. Ry. Co.*, 182 F. 2d 305 (10 Cir., 1950). It is also not at all clear from the record that the appellant was not aware of the Texas statute at the time he filed the notice of voluntary dismissal. In any event, ignorance of the Texas limitation period on the part of the appellant, an experienced lawyer, is not under the circumstances here disclosed the kind of "mistake, inadvertence, surprise, or excusable neglect" contemplated by rule 60 (b).

Affirmed.

UNITED STATES COURT OF APPEALS

For the Second Circuit

THADDEUS G. BENTON,
Plaintiff-Appellant,

vs.

VINSON ELKINS, WEEMS and SEARLS ET AL.,
Defendants-Appellees.

Before Clark, Chief Judge, and Hincks and Stewart, Circuit Judges.

On Petition for Rehearing.

Thaddeus G. Benton, New York City, plaintiff-appellant, *pro se*, and Lawrence W. Krieger, of McNally and Krieger, and Neilson Olcott, New York City, for plaintiff-appellant.

Per Curiam.

Petition for rehearing denied.

C. E. C.
C. C. H.
P. S.
U. S. C. JJ.

June 23, 1958.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 391.

THADDEUS G. BENTON,

Petitioner,

v.

VINSON, ELKINS, WEEMS and SEARLS, a Partnership of Lawyers Composed of JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS, *et al.*, and each of the members of said partnership, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

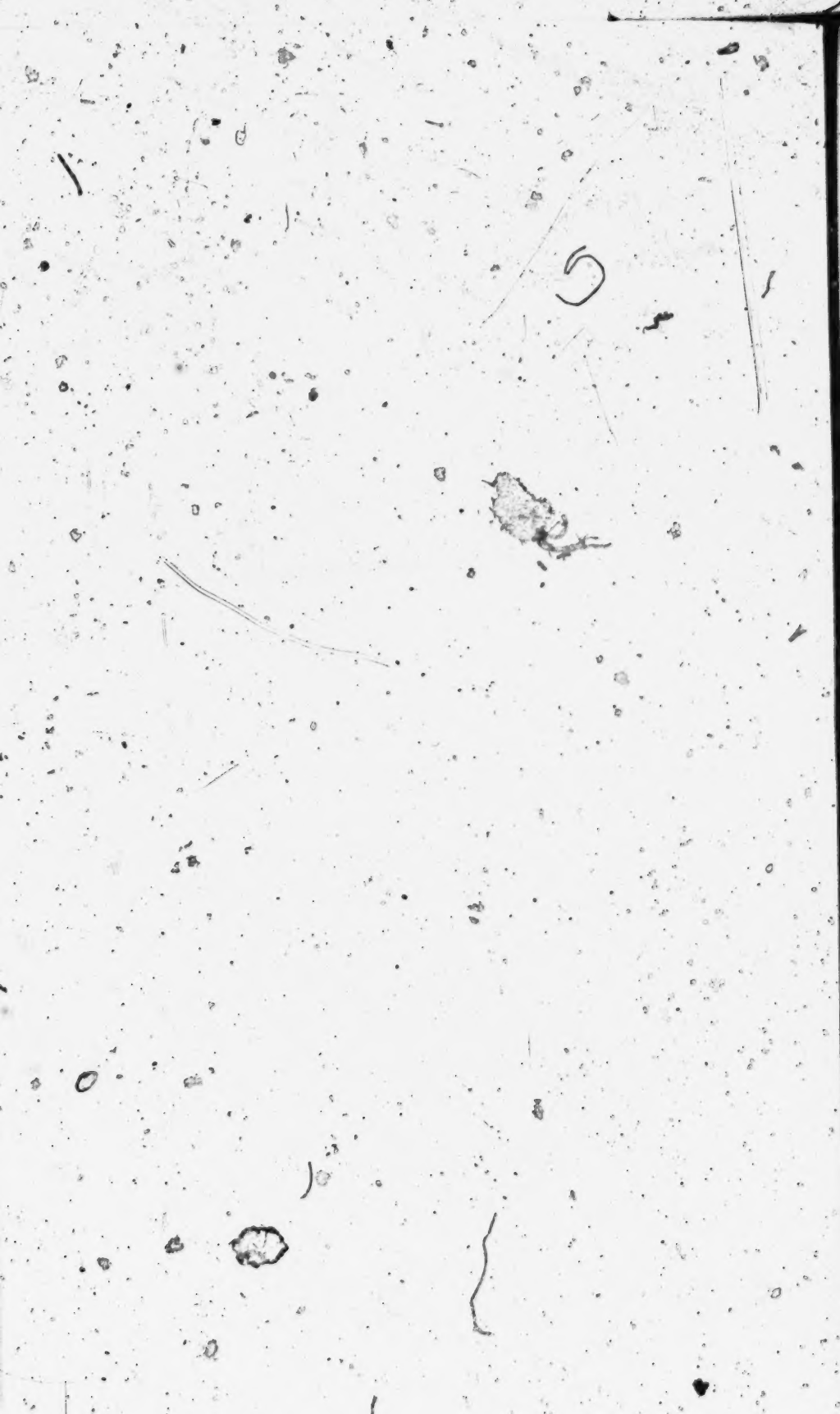
BRIEF FOR RESPONDENT DAVID T. SEARLS.

LEO T. KISSAM,
Counsel for Respondent, David T Searls,
120 Broadway,
New York 5, N. Y.

Of Counsel:

JOSEPH M. O'LOUGHLIN,
HOYT H. HARMON, JR.,
KISSAM & HALPIN,
New York, N. Y.

Bandeck Press, Inc., 22 Thames St., New York, N. Y., U. S. A.



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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT DAVID T. SEARLS.

OPINIONS BELOW.

There was no written opinion in the District Court, petitioner's motion having been denied from the bench (A37*) The *per curiam*** affirmance by the U. S. Court of Appeals for the Second Circuit is reported at 255 F. 2d 299 (App. to Petition, p. 1A-2A). A petition for rehearing was denied *per curiam* without opinion (App. to Petition, p. 3A).

* References preceded by A are to Appendices to Briefs in the Court of Appeals; references preceded by R are to the original typewritten record in the District Court which petitioner has filed in this court.

** Clark, Chief Judge, Hincks and Stewart, Circuit Judges.

JURISDICTION.

Petitioner invokes this Court's jurisdiction under 28 U. S. C. §§2101 (c) and 1254.

QUESTION PRESENTED.

Petitioner, a New York attorney with over thirty-seven years experience at the bar, brought this action in a New York State court against the Houston, Texas law firm of Vinson, Elkins, Weems and Searls and its twenty-seven partners based on a prior litigation in the United States District Court in Texas. The instant action was removed to the Federal District Court in New York by respondent Searls who thereupon moved to transfer the action to the Texas District Court. Petitioner claims that he and his counsel made a "mistake" in not being aware of the Texas Statute of Limitations at the time of opposing the transfer motion, despite the fact that the District Court judge who heard the motion raised the question of the statute of limitations *sua sponte* and petitioner cited in his brief on the transfer motion the leading case on the question of the statute of limitations to be applied in cases of this type. Thus, the question presented is:

> Was Rule 60(b) of the Federal Rules of Civil Procedure, which authorizes a district court in its discretion to relieve a party from a "mistake", intended to be construed so as to relieve an experienced attorney and his independent counsel from an inexcusable failure to be aware of the existence of differing statutes of limitations?

STATUTE INVOLVED.

The pertinent portion of the Federal Rule of Civil Procedure involved (Rule 60(b)) is as follows:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;"

STATEMENT.

Introduction.

This petition represents the last desperate attempt by petitioner to frustrate the orderly administration of justice and to circumvent the now uniform system of Federal procedure solely for his own personal ends. Petitioner, an experienced New York attorney, has repeatedly ignored the admonitions of the U. S. Court of Appeals, the Federal Rules of Civil Procedure and local Court rules. In this one case he has appeared before three United States District Judges and before the U. S. Court of Appeals on three occasions. The lower Courts have been unanimous in concluding that petitioner is not entitled to the relief he seeks and that this litigation should terminate. There is no valid reason why this Court should review this case. This is particularly true since no question of public interest or national importance is here presented, nor does a conflict exist between decisions of the U. S. Courts of Appeals. This is simply a case where the District Court has properly exercised the discretion conferred on it by the Federal Rules of Civil Procedure, and the Court of Appeals has unanimously affirmed the result. This Court could not continue to perform its important and useful functions as a Court

of last resort were it to review every case where a litigant is dissatisfied with the result obtained in the lower Federal Courts. This case falls within that large group of cases which do not qualify for review by this Court.

Because petitioner's statement of the case is replete with opinion, characterization and speculation with respect to the proceedings below, it is essential that the basic facts pertinent to the question involved be restated clearly, as follows:

Nature of the Case.

Petitioner, a New York attorney of some 37 years standing at the bar, brought this tort action to recover $978,862.50 damages from respondents, the well-known and highly regarded Houston, Texas law firm of Vinson, Elkins, Weems & Searls, and the twenty-seven partners of that firm (A17, A28, A48-54). It arises out of prior litigation in the United States District Court for the Southern District of Texas between the petitioner here and one Francis M. Blair, who is not a party to this action (A39, A56). In the Texas litigation (*Benton* vs. *Blair*) respondent here, David T. Searls, and certain of his associates in Vinson, Elkins, Weems & Searls represented defendant Blair (A39). At the conclusion of plaintiff's case, the trial judge (Hon. Ben C. Connally) directed the entry of judgment dismissing the complaint (A39). On appeal, the Court of Appeals for the Fifth Circuit reversed and directed a new trial on the ground that plaintiff's evidence "was sufficient to make a *prima facie* case" (A39-40; 288 F. 2d 55). The action was not retried as directed by the Court of Appeals, but was settled by the payment of $21,137.50 to petitioner Benton after pretrial proceedings and settlement negotiations in which Benton was represented by Warren P. Cunning-

ham, Jr., an attorney from Houston, Texas (A40; R138-139).

The instant action was commenced in the Supreme Court, New York County on November 27, 1956 by the service of a summons without a complaint upon the respondent Searls (A39; R2). None of the other respondents was personally served (A55). Respondent Searls appeared generally on December 13, 1956 and removed the action to the District Court for the Southern District of New York on the ground of diversity of citizenship (A38, A39; R1-4). The complaint was served and filed on January 2, 1957 (A1, A39).

The Complaint.

The complaint in this action contains three separate claims for relief which may be summarized as follows (A48-54):

First, that defendants, as attorneys for Francis M. Blair in the Texas litigation, "knowingly misrepresented to the court material facts" and "caused the trial court unwittingly and mistakenly to believe such facts so misrepresented, and thus the defendants procured a clearly erroneous judgment against the plaintiff (petitioner), as held conclusively and finally by the United States Court of Appeals for the Fifth Judicial Circuit, to the damage of the plaintiff in the sum of $25,000" (A49). The complaint contains no factual allegation of the manner in which defendants tortiously overstepped the recognized prerogatives of advocacy and transgressed the ethical obligations of an attorney (A60). Nor does the complaint allege how plaintiff was damaged by any misrepresentation which may have been made by defendants to the trial court in the

Texas litigation in view of the decision of the Court of Appeals for the Fifth Circuit directing a new trial.

Second, that plaintiff and Blair entered into a stipulation in the *Blair* action whereby Blair agreed not to dispose of certain partnership assets pending final disposition of the Texas litigation (A49-50); and that defendants in procuring the "judgment from the said trial court tortiously and wrongfully caused the said Blair to breach" this stipulation "and did so in his behalf under color of right evidenced by an unauthorized attempted release thereof by the said trial court" (A50). Plaintiff claims to have been damaged thereby in the amount of $1,000,000 although he subsequently settled his action against Blair for $21,137.50 (A40, A53).

Third, that defendants because of their "great influence in Houston, Texas * * * caused the trial judge * * * to have a bent and prejudiced mind against this plaintiff" (A50) and the trial judge "evinced his intention and purpose of not proceeding fairly and dispassionately with the further trial of the action, of his prejudgment of the case, and of deciding the facts against plaintiff" (A52); thereby preventing plaintiff from obtaining a fair and impartial further trial (A53); and that plaintiff because of "nervous exhaustion, fear and financial distress" was "coerced, harassed and compelled under duress" to compromise his claim against Blair for "a pittance of approximately $21,137.50" (A53) although he "would have been entitled to recover judgment against the said Blair for properties of a value of approximately $1,000,000" (A53).

The Proceedings in the Courts Below.

On January 10, 1957 respondent Searls moved, pursuant to 28 U. S. C. A. §1404 (a), to transfer this action to the United States District Court for the Southern District of Texas (A40). The motion was argued on January 18, 1957 before District Judge Sylvester J. Ryan (A41). Petitioner, who as previously stated is an experienced New York attorney, argued the motion on his own behalf (R237). During the argument, Judge Ryan inquired as to whether any question of the Statute of Limitations was involved in this case and petitioner made no claim that any such question was involved (A65).

After argument of the transfer motion petitioner served a cross-motion for summary judgment on issues of liability (A41). Respondent Searls promptly served a notice specifying defects in petitioner's motion papers which rendered them defective and of no legal effect (R134-135). Petitioner thereafter made no attempt whatever to correct these defects.

While the transfer motion was *sub judice,* respondents (other than David T. Searls) moved to dismiss the complaint on the grounds that the Court did not have jurisdiction over the person of the respondent partnership and the individual partners thereof and that the attempted service of process on such respondents was insufficient. This motion was referred to Judge Ryan (A40, A41).

On January 28, 1957, petitioner, as co-counsel for himself, submitted to Judge Ryan a brief in connection with the transfer motion. In this brief, petitioner cited the case of *Headrick* v. *Atchison, T. & S. F. Ry. Co.,* 182 F. 2d 305 (10th Cir. 1950), which is one of the leading cases on the question of the consideration to be given to the

Statute of Limitations in connection with a motion to transfer (A44-45, A64). It must be assumed that petitioner read the *Headrick* case before citing it and his having done so precludes his subsequent claim (repeated in the petition herein, pp. 8, 26) of ignorance, before the transfer motion was decided, of the differing statutes of limitations of New York and Texas.

In a twelve page opinion dated February 28, 1957 (A55-63), Judge Ryan granted the motion to transfer; denied the motion for partial summary judgment and denied the motion to dismiss for lack of jurisdiction, without prejudice to a renewal thereof in the transferee forum, if respondents were so advised. In his opinion Judge Ryan stated:

> "The charges which plaintiff makes in his present complaint are of an extremely grave and serious nature. Due respect for the administration of justice requires that they be openly heard and tried in the very forum where the alleged tortious acts are claimed by him to have occurred. Plain and simple justice to the court of that district, to the judge who is named and to the members of the bar, who are named as defendants, dictates that they not be required to make defense in a distant forum. The primary issue presented is plainly the personal integrity of that court and of the bar of that district. Those who were involved in the Blair suit, its conduct and subsequent settlement all are residents of the district to which transfer is sought" (A62).

Regarding petitioner's charges that he could not obtain a fair trial of this action in Texas, Judge Ryan stated:

> "The statement that plaintiff makes in his brief that New York is 'the only jurisdiction available to plaintiff where both parties may be assured of a fair trial, before an unprejudiced jury, and a judge who

> may be assuredly unprejudiced as to all' reflects no credit upon him, is unworthy of a member of the Bar and cannot be overlooked even when one considers that his personal interest in the outeome of this litigation may have warped his „judgment'' (A62).

The order directing the transfer of this action to the Texas District Court was entered on March 11, 1957 and provided therein that the time for respondents to move or answer with respect to the complaint was extended until after the file in the action was actually received by the Clerk of the transferee Court (R237-238).

Before the file could be physically transferred to the Clerk of the District Court in Texas, petitioner, on March 18, 1957, filed in the Court of Appeals for the Second Circuit a petition for a writ of prohibition or an order vacating the order transferring this action to the Texas District Court (A41). There petitioner contended that Judge Ryan abused his discretion in granting the transfer. The petition for a writ was argued on April 8, 1957 and on April 16, 1957 the Court of Appeals in a *per curiam* decision denied the petition (A41).

Prior to the return of the file to the District Court for transfer to the Texas District Court, petitioner, on April 26, 1957 served and filed a notice of voluntary dismissal of this action pursuant to Rule 41(a) (1) of the Federal Rules of Civil Procedure (A41-42; R258). Respondent Searls moved to vacate this notice of dismissal. Petitioner vigorously opposed the motion which was granted in an opinion and order dated May 31, 1957 (A42; R289-293; R299-307). Petitioner moved for reargument of this motion (A42; R309-319; R339-342B).

While his application for reargument was *sub judice*, petitioner, on June 19, 1957 obtained an order requiring

respondents to show cause on June 25, 1957 "why the court should not issue the following orders:

(a) Granting leave to plaintiff to file the amended complaint attached to the annexed motion *and* ordering that jurisdiction of the action be retained on the basis of the amended complaint, and ordering that the record herein be not transferred to the U. S. District Court for the Southern District of Texas; and

(b) An order granting leave to plaintiff to withdraw the notice of dismissal heretofore filed in the event the foregoing combined relief be granted;"* (A7-8).

Neither the June 19, 1957 order to show cause (quoted above) nor petitioner's supporting affidavit, sworn to June 19, 1957 (A7-14) makes any reference to any Federal Rule of Civil Procedure pursuant to which petitioner was seeking relief from the Court and more particularly, no mention whatever was made of Rule 60(b) of said Rules (Relief from Mistakes, Inadvertence, Excusable Neglect, etc.), on which petitioner now claims he was then relying.

In opposing this motion, which was argued July 9, 1957, respondent Searls contended that since his motion to vacate petitioner's notice of dismissal had been denied* and since petitioner sought leave to withdraw his notice of dismissal only on condition that the Court first grant the other relief sought by his motion, the notice of dismissal effectively terminated the action and the Court lacked jurisdiction to hear and determine the motion (R355-382). In his memorandum and order of July 12, 1957 U. S. District Judge Thomas F. Murphy so held, stating:

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* Before this motion was heard, Judge Cashin on June 24, 1957 granted petitioner's application for reargument of respondent Searls' motion to vacate the notice of dismissal and, because of intervening decisions of the Court of Appeals for the Second Circuit, reversed his decision of May 31, 1957 and denied respondent Searls' motion to vacate the notice of dismissal (A42; R328-333).

> "Since there is no action pending in this district because of plaintiff's voluntary dismissal the court lacks jurisdiction and the motion is, in all respects, denied. This is an order. No settlement is necessary" (A42).

Petitioner's motion for reargument was denied on August 7, 1957 (R343-346).

Petitioner then appealed to the U. S. Court of Appeals for the Second Circuit. Respondent Searls moved to dismiss the appeal on the ground that there had been no final decision terminating the litigation on the merits (A43). On October 17, 1957, the Court of Appeals denied the motion to dismiss the appeal in the following opinion:

> "Motion to dismiss the appeal is denied, since we think the order below final for the purposes of appeal. Plaintiff appears to have presented his motions below in the wrong order. Had he moved first to vacate the notice of dismissal we do not see why the court would not have jurisdiction. The plaintiff's intent being clear, we think the court should first pass upon the motion to vacate, thereafter considering the other motions if still pertinent. The action is therefore reversed and remanded" (A43).

The Order Sought to be Reviewed Here.

a. Proceedings in the District Court.

On November 6, 1957 petitioner served a notice of motion "for the further hearing, consideration and determination of plaintiff's motion filed herein on June 20, 1957 for (1) leave to file an amended complaint and for an order that the action be not transferred to the U. S. District Court for the Southern District of Texas, and (2) for leave to withdraw the notice of dismissal theretofore filed in the event

the foregoing relief be granted" (A6-7, A43). Petitioner, an experienced attorney, persisted in presenting his motions in what the Court of Appeals in its October 17, 1957 opinion (quoted above) found to be "the wrong order" and failed to move "first to vacate the notice of dismissal" which the Court held would have given the District Court jurisdiction. Furthermore, no mention was made of the Federal Rule of Civil Procedure or statute pursuant to which petitioner sought relief from the District Court. Finally, petitioner, "a lawyer of some 37 years' standing at the bar" (A17), admitted at the argument of this motion before District Judge William B. Herlands on November 26, 1957, that he failed to serve with his notice of motion a supporting affidavit or any papers whatever (A22), as is required by Rule 6(d) of the Federal Rules of Civil Procedure. He ignored the well-established practice on a motion of this kind which was succinctly explained to him at the hearing on the motion by Judge Herlands as follows:

> "Your obligation, when you are making a motion under Rule 60(b), you just can't come into court and say that you made a mistake and you want to be relieved of it because the burden is on you to set forth in your motion papers * * * the facts and circumstances showing the mistake, inadvertence or excusable neglect.
>
> "You just come here and serve a notice of motion and ask the Court to go through a voluminous file and the opinions of other judges and the opinions of the Court of Appeals and try to figure out on the basis of the record what facts and circumstances there are in support of your motion.
>
> "Your support is to submit an affidavit and brief to set forth all these facts, but particularly the moving affidavit" (A34-35).

Plaintiff's weak explanation for his flagrant violation of the Rules was:

"I misconceived that" (A34).

Despite this unauthorized procedure originated by petitioner, affidavits opposing his motion were duly served and filed on behalf of respondent Searls. When this motion was called for argument before Judge Herlands, the petitioner requested that a stenographic record of the argument be made, and accordingly the entire argument is recorded (A17-37). Reference to the transcript (A17-37) will readily demonstrate that more than two-thirds of the transcript is devoted to petitioner's argument and to colloquy between him and the Court.

In ruling on petitioner's motion, Judge Herlands assumed that petitioner's notice of motion "is all right" (A36), that petitioner "submitted an affidavit" (A36), and that the facts presented by petitioner on oral argument "are true" (A35) and Judge Herlands accepted petitioner's oral presentation "with the same force and effect as if they were set forth in an affidavit" (A36). With all of these assumptions favorable to petitioner, Judge Herlands found that there was no mistake here (A36), that petitioner's voluntary dismissal with advice of independent counsel "was a deliberate, calculated, thought-out move" (A35) and that "there isn't the slightest justification for the Court, considering the total record here, to permit you [petitioner] to vacate the notice of dismissal" (A35).

Accordingly, Judge Herlands denied the motion from the bench (A37) and thereafter endorsed and signed on the back of petitioner's notice of motion a memorandum order reading:

"Motion denied in its entirety. So ordered" (A7).

Counsel for respondent Searls applied to the Court, pursuant to General Rule 10 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York, for a long form order (A66-67). Counsel did so to insure that the Court of Appeals would read the transcript of the proceedings (in full) before Judge Herlands, and conclude, as Judge Herlands did, that this litigation should terminate. Every indulgence in regard to unauthorized procedures, inadequate papers, untimeliness and so forth has been accorded the petitioner in spite of the fact that he has been a member of the bar for "some 37 years" (A17) and formally settled for $21,137.50 the claim and lawsuit on which this alleged action is predicated.

After receiving notice of this application and a copy of the proposed long form order, petitioner on December 6, 1957 filed his objections thereto.* At the same time, petitioner filed his notice of appeal to the Court of Appeals (R442, R486-489).

b. Proceedings in the Court of Appeals.

In the Court of Appeals, petitioner argued that the Texas Statute of Limitations would bar his action whereas the New York Statute would not, that he and his counsel had made a mistake in not being aware of the Texas Statute at the time he filed his voluntary discontinuance of the action, that, since on the basis of his proposed amended complaint, there is no ground for transferring the action to Texas, jurisdiction should be retained in New York, and that there was an abuse of discretion in the District Court.

Respondent on the other hand contended that petitioner's motion was one invoking the discretion of the District Court, that the District Court had not abused its discretion

* Judge Herlands signed the long form order on December 6, 1957 (A68).

or treated petitioner unfairly in the hearing and denial of his motion, that there had been no mistake justifying the relief sought by petitioner and that even if petitioner had made a mistake, it was not such a mistake as to justify relief under Rule 60(b) (1) of the Federal Rules of Civil Procedure.

The Court of Appeals adopted respondent's contentions. It unanimously held that the motion invokes "the discretionary power of the District Court", that "that discretion was not improperly exercised here", that it was not clear that a mistake had been made or if made that it was material and finally that "In any event, ignorance of the Texas limitation period on the part of the appellant, an experienced lawyer, is not under the circumstances here disclosed the kind of 'mistake, inadvertence, surprise, or excusable neglect' contemplated by rule 60 (b)" (App. to Petition, p. 2A). Accordingly, the Court of Appeals affirmed the order of the District Court. Petitioner's subsequent application for rehearing was denied (App. to Petition, pp. 2A-3A).

I.

This Court should not grant certiorari to review the unanimous affirmance by a U. S. Court of Appeals of a purely discretionary order of the District Court which affects only the private interests of petitioner and does not present a substantial question of public importance or a conflict with decisions of this Court or other Courts of Appeal.

The law is well established that a motion under Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from mistake or inadvertence invokes the discretion-

ary power of the District Court. *Fischer* v. *Dover Steamship Co., Inc.*, 218 F. 2d 682 (2d Cir. 1955); *Smith* v. *Kincaid*, 249 F. 2d 243 (6th Cir. 1957); *Rychlik* v. *Brotherhood of Railroad Trainmen*, 130 F. Supp. 580 (W. D. N. Y. 1955). The Court of Appeals in the instant case recognized and applied this prevailing rule, and, after considering the facts and hearing argument, held that such discretion had not been improperly exercised by the District Court.

The discretionary order of the District Court denying petitioner's motion under Rule 60(b) having been affirmed by the Court of Appeals, it would not be proper for this Court to give the petitioner still another hearing on the same discretionary order. This Court has long recognized that its jurisdiction on review is not to sit for the purpose of reviewing discretionary orders in the lower courts. *Ward* v. *Joslin*, 186 U. S. 142, 153 (1902); *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592, 598 (1864). In this latter case, this Court said at p. 598:

> "Indeed, the universal rule of practice is, that matters resting entirely in discretion are not re-examinable in a court of errors, and there can be no departure from that rule in this court without overruling its settled practice from the organization of the court to the present time."

The petitioner attempts to convert the application of a single procedural rule, 60(b) of the Federal Rules of Civil Procedure, into a broad federal question by claiming that the denial of his motion in the District Court "will operate to complicate and confuse the administration of justice in the federal courts, and to destroy private rights of substantial value" (Petition, p. 2).

It is apparent that this hypothesis for bringing the cause before this Court will not stand the tests for review

on certiorari as enunciated in opinions of this Court. This Court does not sit for the benefit of individual litigants seeking but further review of questions which have arisen in connection with their personal and particular causes of action. The cases must involve questions of importance which it is in the public interest to have decided by this Court of last resort. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163 (1923). The question should not be reviewed merely because it is scholarly or presents an intellectually interesting problem, but it must involve some special and important reason which reaches beyond the academic or episodic. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74 (1955). Certiorari should be granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the courts of appeal. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923); *Fields* v. *United States*, 205 U. S. 292, 296 (1907).

In essence this case involves a simple procedural question entirely within the discretion of the District Court. The District Court found, and the Court of Appeals affirmed the finding, that petitioner, an experienced lawyer, was not entitled to relief under Rule 60(b) (1) in claiming to be ignorant of the Texas two-year statute of limitations. The District Court, in its discretion, ruled that such ignorance in this case was not the kind of "mistake, inadvertence, surprise or excusable neglect" contemplated by Rule 60(b). Certainly this simple ordinary procedural question does not present any vast problem of peculiar gravity or general importance. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916); *American Construction Co.* v.

Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 383 (1893); *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58 (1892).

The petitioner further asserts that the District Court's order, as affirmed by the Court of Appeals, is based upon law which is "overcome by numerous Supreme Court decisions to the contrary" (Petition, p. 27). Petitioner has cited no cases in his petition to show that the decision of the Court of Appeals here is "overcome" by decisions of this court, or is in conflict with decisions of other Courts of Appeals. In not one of the many cases cited by petitioner was there involved a question of a removal of an action from a state court to a federal court and a subsequent transfer from the federal court to a federal court in another state.

There is patently no conflict with decisions of this Court or with decisions of the various Courts of Appeals on any question involved in this case, and petitioner's attempt to create such a conflict as a means of seeking certiorari is groundless.

II.

The unanimous holding of the Court of Appeals that there was no abuse of discretion in the consideration and denial of petitioner's motion in the District Court is clearly supported by the record.

Petitioner claims there was an abuse of discretion by the District Court in failing to read certain papers claimed to be a part of his motion argued on November 26, 1957 (Petition, p. 10). The papers were (1) "the motion of plaintiff of June 19, 1957, and his accompanying affidavit" and (2) "the plaintiff's memorandum on motion for leave to file amended complaint, etc. filed at the hearing on November 26, 1957".

This contention is apparently the basis for petitioner's scandalous and repetitious charge that Judge Herlands "inconsiderately, impulsively and impetuously" denied his motion (Petition, pp. 10, 16, 17, 20, 34, 35, 42).

As to the "motion of plaintiff of June 19, 1957 and his accompanying affidavit", these papers constituted the papers submitted, not in support of the motion argued before Judge Herlands on November 26, 1957, but in support of the motion argued before Judge Murphy on July 9, 1957 and denied by him on July 12, 1957 (A42, *supra*, p. 11). At the hearing before Judge Herlands, petitioner admitted that there were no affidavits filed in support of the motion then being argued (A22).

As to petitioner's memorandum filed at the hearing on November 26, 1957, regardless of whether or not in fact Judge Herlands read the memorandum (it is petitioner's assumption only that he did not), petitioner was given ample opportunity to present his contentions at length on oral argument before Judge Herlands and did so. Over two-thirds of the transcript of the argument of the motion consists of petitioner's argument and the colloquy between petitioner and the Court. After petitioner had stated the three reasons why he claimed he should be relieved of his alleged mistake (A27) (reasons which were merely repeated in his memorandum), Judge Herlands asked him "What is point 4?" (A28). Petitioner replied "Those in headline form are my reasons" (A28). After argument by respondent's counsel, petitioner stated he wanted to answer "Very briefly" and was given the opportunity to do so (A34).

Thus there is clearly no basis for petitioner's claim of an abuse of discretion; nor is there any basis for his reckless charge that Judge Herlands "inconsiderately, impulsively and impetuously" ruled on the motion. A simple reading of the transcript of the argument before Judge

Herlands (A17-37) demonstrates the absurdity of these charges. The transcript clearly shows that Judge Herlands gave petitioner the benefit of every possible doubt. Petitioner's failure to comply with the direction of the Court of Appeals that he first move to vacate his notice of dismissal and petitioner's failure to serve supporting affidavits with his notice of motion as required by Rule 6(d) of the Federal Rules of Civil Procedure, were, in effect, all excused by Judge Herlands (A30-31). The Court even assumed that all of the facts stated by petitioner were true and that they were properly submitted in affidavit form (A35, A36). Under these circumstances it is inconceivable that petitioner would even dare to charge that he had been treated unfairly.

III.

Petitioner's motion to withdraw his notice of dismissal, for leave to file an amended complaint and for an order preventing transfer was properly denied by the District Court and the Court of Appeals did not err in unanimously affirming the denial.

A. There was no mistake or inadvertence by petitioner.

The only ground upon which petitioner relied in the District Court to support his motion for leave to withdraw his voluntary notice of dismissal was a claimed mistake in failing to apprehend, at the time he filed his notice of dismissal, that if this action is transferred to Texas, it might be barred by the Texas two-year Statute of Limitations whereas if it remains in New York, it will not be barred by the New York three-year Statute of Limitations. The District Court and the Court of Appeals properly held that no such mistake was established by petitioner (A36, Appendix to the Petition, p. 2A).

The following facts amply justify this holding:

1. When the motion to transfer this case to the Texas District Court was argued before Judge Ryan on January 18, 1957, the issue of whether any question of the Statute of Limitations was involved in this case was specifically raised by Judge Ryan himself (A65). Petitioner, an experienced attorney, who argued the motion on his own behalf, made no claim that any such question was involved (A65). Even if petitioner in fact was unaware of the problem on the day of argument, he had ample time to research the question and present his views to Judge Ryan, since the motion was not decided until February 28, 1957, over a month later. However, petitioner did not do so. Petitioner claims that it was not until after he filed his notice of dismissal on April 26, 1957 that "by studious care" he found that the Statutes of Limitations in New York and Texas were different (A24-25). Such complete indifference to a question raised by the Court certainly does not support a claim of inadvertence or mistake.

2. Furthermore, this belated claim of ignorance will not withstand test, as on January 28, 1958 petitioner filed with Judge Ryan an eight-page brief opposing the transfer motion (A44). At page 5 of this brief (A64) petitioner cited the case of *Headrick* v. *Atchison, T. & S. F. Ry. Co.*, 182 F. 2d 305 (10th Cir. 1950). This is one of the leading cases on the question of the consideration to be given to the Statute of Limitations on motions to transfer. Having cited the case, certainly it must be presumed that petitioner read it and that having done so, his attention was attracted to a consideration of this question on transfer motions. A claim of mistake under these circumstances is preposterous and beyond credulity.

Just as there was no mistake by petitioner, so also there was no inadvertence when he filed his notice of dismissal. He glibly admitted to Judge Herlands that he deliberately filed the notice of dismissal to prevent the transfer to the Texas District Court, which Judge Ryan had ordered. (A26). Judge Herlands in this connection stated:

> "The fact remains that you [petitioner] discontinued this action. You did it voluntarily. You say you are a lawyer who has practiced for 30 years; You have had counsel. That dismissal which was voluntarily filed was not an impulsive act. It was a deliberate, calculated, thought-out move" (A35).

Under these circumstances, it is difficult to understand how petitioner can argue that the filing of the notice of dismissal was inadvertent.

B. The mistake, if made, is immaterial.

Even if one assumes that petitioner made a mistake in not being aware of the differing Statutes of Limitations in New York and Texas, it is an immaterial mistake which in this case does not justify relief under Rule 60(b). The *Headrick* case, *supra*, p. 7, establishes that when an action commenced in a state court is removed to a Federal Court in that state and thereafter transferred to a Federal Court in another state, the statute of limitations of the state where the action was commenced must be applied in the transferee Federal Court. The *Headrick* case was originally commenced in the New Mexico State Court and removed by defendant to the New Mexico Federal Court on the grounds of diversity of citizenship. Defendant then moved to dismiss the action or in the alternative to transfer it to California. The District Court dismissed the complaint on the ground of *forum non conveniens* indicating that it would have transferred the action to California had the Statute

of Limitations of that state not run, but since it had, a transfer would be futile and unavailing. The Court of Appeals for the Tenth Circuit reversed and remanded for further consideration as to where the balance of convenience lies.

In its opinion, the Court considered the effect of differing statutes of limitations as applied to transfer motions, *particularly in cases originating in State Courts*, and stated at pp. 309-310:

> "Then, too, we think the court was in error in assuming that upon transfer from the District of New Mexico to the District of California under the provisions of §1404(a) the California statute of limitations would be applicable. The plaintiff's action was transitory in its nature. He had a legal right to select any forum where the defendant was amenable to process and no contention is made here that the case was not properly brought in the New Mexico state court. It is conceded that the action is not barred by the New Mexico statute. Had the case been tried in the New Mexico state court, the procedural laws of New Mexico including the statutes of limitation would be applicable. It is a well established principle that in removal cases the Federal Court must apply the state law and the state policy.
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> • • • • • •
>
> "Neither can a Federal Court in a diversity case take away that which a state has given. Upon removal to the Federal Court in New Mexico, the case would remain a New Mexico case controlled by the law and policy of that state, and if §1404(a) is applicable and a transfer to the California court is ordered for the convenience of the parties the witnesses and in the interests of justice, there is no logical reason why it should not remain a New

> Mexico case still controlled by the law and policy of that state."

So in the instant case, a transitory action originally commenced in the New York State Court and removed to the Court below, the fact that the statutes of limitations of New York and Texas may be different would be no ground for denying a transfer to the Texas District Court even if petitioner had been aware of the differing statutes of limitations and had urged them before Judge Ryan in January 1957 when the transfer motion was argued. Thus, it is clear that petitioner's mistake, assuming there was one, is immaterial.

Furthermore, even if the Texas two-year Statute of Limitations was applied to this action after it was transferred to the Texas District Court, that statute would not bar the claim alleged in petitioner's complaint herein. The complaint (A48-54) alleges that the tortious acts which form the basis of petitioner's claim were committed by the defendants before the trial court in the Texas action of *Benton* v. *Blair*. That trial commenced on December 13, 1954. The Texas two-year Statute of Limitations did not expire until December 13, 1956, whereas the instant action was commenced on November 27, 1956. Petitioner has attempted to mislead this Court and the Courts below (Petition, p. 22; A10-11) by claiming that certain tortious acts involved in this action were committed *prior to* the commencement of the trial of the Texas action. There is no such allegation in petitioner's complaint (A48-54). Petitioner's belated reliance upon such acts is merely an afterthought to support his spurious argument in this Court and in the Courts below.

C., The amended complaint and order preventing transfer.

If petitioner were permitted to withdraw his notice of dismissal, this action would then revert to the status existing at the time the notice was filed on April 26, 1957. At that time Judge Ryan's transfer order of March 11, 1957 was fully effective, the Court of Appeals on April 16, 1957 having denied petitioner's petition for a writ of prohibition or order vacating the transfer order. Thus, if the notice of dismissal is withdrawn, the transfer order is reinstated and the only court having jurisdiction of any further motions in this case is the Texas District Court. Otherwise the anomalous situation is created of a New York District Court permitting the amendment of a complaint which, as Judge Herlands noted, "has heretofore been ordered transferred to Texas" (A35).

There is no authority in the Federal Rules of Civil Procedure, or elsewhere, for an order directing that a case previously ordered transferred to another district, be retained in the transferor district. The District Court properly denied this request by petitioner, particularly in view of the fact that the Court of Appeals previously denied a petition for an order vacating the transfer order. This request is nothing but a scheme originated by petitioner to obtain another review of the propriety of transferring this action to the Texas District Court. Such conduct was not countenanced by either the District Court or the Court of Appeals. As stated by the District Court "There has got to be some finality to litigation. We just can't have this revolving-door method of disposing of matters" (A36).

Furthermore, even if such a procedure were authorized, there is no basis for granting the relief requested by

petitioner and his motion was properly denied. Petitioner claims, that if he was permitted to file his proposed amended complaint, the sole basis for Judge Ryan's transfer order (the third cause of action in the original complaint (A50-53)) would no longer exist. There is no merit in this contention.

In his opinion Judge Ryan stated:

> "The charges which plaintiff makes in his present complaint are of an extremely grave and serious nature. Due respect for the administration of justice requires that they be openly heard and tried in the very forum where the alleged tortious acts are claimed by him to have occurred. Plain and simple justice to the Court of that district, to the judge who is named and to the members of the bar, who are named as defendants, dictates that they not be required to make defense in a distant forum. The primary issue presented is plainly the personal integrity of that court and of the bar of that district. Those who were involved in the Blair suit, its conduct and subsequent settlement all are residents of the district to which transfer is sought" (A62).

It is obvious that Judge Ryan in no way limited these statements to the third cause of action in the complaint but rather was addressing himself to the complaint as a whole. The two causes of action alleged in the proposed amended complaint (A14-16) are essentially copies of the first two causes of action alleged in the complaint herein. What was said by Judge Ryan concerning the charges made in the complaint is equally true of those made in the proposed amended complaint. Accordingly, there is no merit to petitioner's contention that if he is permitted to file his proposed amended complaint, the sole basis for Judge Ryan's transfer ord ould be eliminated.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

Leo T. Kissam,
Counsel for Respondent, David T. Searls.

Of Counsel:

Kissam & Halpin,
Joseph M. O'Loughlin,
Hoyt H. Harmon, Jr.,
New York, N. Y.